Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARTECH USA, INC.,
Petitioner,

v.

GIL HOEFLICH,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In defining Jones Act status, what is the scope of employment, or work assignments, that must be considered in determining the "substantial connection" requirement for seaman status under *Chandris, Inc. v. Latsis,* —— U.S. ——, 115 S. Ct. 2172 (1995), the one issue remaining unresolved after *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991), and *Chandris, Inc. v. Latsis,* —— U.S. ——-, 115 S. Ct. 2172 (1995)?

Is it (a) all of the assignments during the course of Respondent's employment with Petitioner, as Petitioner contends; or (b) only the assignment at the time of the injury, as Respondent contends; or (c) the assignment at the time of the injury, together with future assignments which Respondent might have expected, as the Court of Appeal held?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal of the State of California, First Appellate District ("Court of Appeal") are as follows: Gil Hoeflich, plaintiff, appellant, and Respondent herein; Martech USA, Inc., defendant, respondent, and Petitioner herein.

The following were also parties to the proceeding in the Superior Court of California for San Francisco County ("trial court") but not in the Court of Appeal: Martech International, Inc. was dismissed prior to trial pursuant to agreement of tne parties. The trial court directed a verdict in favor of defendants Morrison Knudsen Corporation, Manson Construction & Engineering Company, and Point Loma Constructors, a Joint Venture Between Morrison Knudsen Corporation and Manson Construction & Engineering Company, and final judgment was entered in their favor. No appeal was taken from that final judgment.

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES (RULE 29(6))

There is no parent company or nonwholly owned subsidiary of Petitioner Martech USA, Inc.

Martech USA, Inc. is a chapter 7 debtor in bankruptcy in the United States Bankruptcy Court for the District of Alaska, which lifted the automatic stay for purposes of this action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No.

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

---

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, which held that Respondent is a seaman (crewmember) covered by the Jones Act, 46 U.S.C. App. § 688, because Respondent's work assignments at the time of his injury, together with future work assignments which he might have expected had he not been injured, constitute a connection to a vessel in navigation that is substantial in terms of its duration and nature. Appendix, at 2a.

This Court, in recent decisions, has clarified all but one of the elements of seaman status. In *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991), this Court held that the first prong of the test for seaman status requires that an employee contribute to the mission of the vessel, and not merely to its transportation function. In *Chandris, Inc. v. Latsis,* —— U.S. ——, 115 S. Ct. 2172 (1995), this Court held that the second prong of the test for seaman status requires that an employee have an employment-related connection to a vessel in navigation that is substantial in terms of its duration and nature. In *Desper v. Starved Rock Ferry Co.,* 342 U.S. 187 (1952), this Court considered what constitutes a vessel in navigation.

Left unresolved is only one issue, the scope of employment that must be considered in determining the substantial connection requirement of *Latsis. Papai v. Harbor Tug & Barge Company,* 67 F.3d 203 (9th Cir. 1995), *cert. granted, Harbor Tug & Barge Company v. Papai,* —— U.S. ——, 117 S. Ct. 36 (1996), involves the scope of employment that must be considered where there are multiple employers. The present case involves the scope of employment that must be considered where there is a single employer. Here, the parties and the Court of Appeal adopted three positions on this issue; the Ninth Circuit in *Papai* adopted a fourth. The present case provides the Court an opportunity to complete its definition of seaman status.

THE OPINIONS AND ORDERS ENTERED IN THE CASE ARE UNREPORTED

1. The Final Judgment of the Superior Court of California for the County of San Francisco, entered on October 20, 1995, on the court's Order Granting Motion for Judgment Notwithstanding the Verdict and, in the Alternative, Conditionally Granting Motion for New Trial ("JNOV"), is unreported. It appears in the Appendix, at 15a.

2. The decision and opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, filed July 23, 1996, is unpublished, by order of the court. It appears in the Appendix at 2a.

3. The decision of the Supreme Court of California denying the Petition for Discretionary Review in *Gil Hoeflich v. Martech USA Incorporated*, S055885, appears at 1996 Cal. LEXIS 5808 (Oct. 16, 1996) and in the Appendix, at 1a.

BASIS FOR JURISDICTION

The order of the Supreme Court of California denying Petitioner's Petition for Discretionary Review was entered on October 16, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The final decision was rendered by the Court of Appeal, the highest court of the State of California which rendered a decision on the merits, the Supreme Court of California denying the Petition for Discretionary Review. Rights, privileges, or immunities are claimed under a statute of the United States, namely, the Jones Act, 46 U.S.C. App. § 688.

STATUTES INVOLVED IN THIS CASE

The statute involved in this case is the Jones Act, 46 U.S.C. App. § 688, set out in the Appendix, at 39a. Petitioner contends that jurisdiction over Respondent's claim lies in the Department of Labor under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and not in the courts under the Jones Act.

STATEMENT OF THE CASE

This personal injury action was brought against Petitioner, the diving contractor on a San Diego sewer outfall project, by Respondent, its employee, who, in his own

words, "shot [him]self in the foot" (Appendix, RT 432, lines 20-23) with a high pressure water gun during a dive on the project. On the day of his injury, Respondent was assigned to the ARCTIC CAROLYN, a vessel owned and operated by Petitioner, which transported Respondent to the construction dive site off the coast of California and supported dive operations. Respondent's claim against his employer is governed either by the LHWCA, and is an administrative claim within the jurisdiction of the United States Department of Labor, or is governed by the Jones Act, and is a claim within the jurisdiction of state and federal courts. Although the claims are mutually exclusive,[1] Respondent brought claims under both, a claim under the LHWCA in the administrative forum (still pending), and a claim under the Jones Act[2] in the trial court (this action).

There is no dispute that the law provides compensation to Respondent for an injury. The only dispute is whether Respondent's claim is governed by the LHWCA and within the jurisdiction of the Department of Labor (Petitioner's position, adopted by the trial court), or governed by the Jones Act and the general maritime law and within the jurisdiction of the state court (Respondent's position, adopted by the Court of Appeal). The choice is resolved by a determination of "seaman status": If Respondent is not a "seaman," his claim is properly in the Department of Labor. If Respondent is a "seaman," his claim is prop-

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[1] The LHWCA covers maritime employees, but expressly excepts crewmembers covered by the Jones Act. 33 U.S.C. § 902(3)(G).

[2] Respondent's complaint contained causes of action for negligence under the Jones Act; unseaworthiness, a strict liability cause of action against a vessel owner, a cause of action created by the general maritime law, a body of federal common law; maintenance and cure, causes of action against an employer for meals and lodging and for medical treatment to the point of maximum cure. All of these causes of action accrue in favor of a "seaman." Thus, the issue of "seaman status" is common to all these causes of action and determines whether these causes of action have merit.

erly in the state court. Whether Respondent is a seaman is determined, for purposes of this case, by the scope of employment, or work assignments, that must be considered in determining seaman status. This issue, together with the related issue in *Papai*, is the one issue left unresolved by this Court's recent decisions on seaman status.

The federal question, the applicability of the Jones Act, was raised in the Complaint, which invoked it. Petitioner also raised the question of the applicability of the Jones Act in the trial court in its motion *in limine*, which the court denied, without prejudice; in its trial brief; through evidence introduced at trial, *see, e.g.*, portions of the trial transcript reproduced in the Appendix; in Petitioner's motion for a directed verdict, denied by the court; and in Petitioner's post-trial motions for JNOV and for a new trial. The trial court granted Petitioner's motion for JNOV, holding that Respondent was not a seaman covered by the Jones Act. Order Granting Motion for Judgment Notwithstanding the Verdict and, in the Alternative, Conditionally Granting Motion for New Trial, in Appendix, at 15a.

The federal question was the subject of the assignments of error in Respondent's appeal, taken from the JNOV in Petitioner's favor, and Petitioner's cross-appeal, taken from the "Judgment on Special Verdict."

The Court of Appeal reversed, believing, contrary to the rule established by this Court, that the required substantial connection to a vessel in navigation could be found by considering the work assignments which Respondent might have expected in the future, known as the "expectant seaman" doctrine:

> There was evidence here that plaintiff had a connection substantial in duration and nature to the *Arctic Carolyn* and other identifiable vessels in navigation. His assignment to the San Diego sewer project *was*

expected to last approximately one year, with dives from the Arctic Carolyn and two seagoing barges.

Decision of the Court of Appeal, Appendix, at 2a (emphasis added).

The federal question, in particular the "expectant seaman" doctrine, was the subject of Petitioner's petition for rehearing in the Court of Appeal, which denied it without opinion. Appendix, at 12a.

The federal question was the subject of Petitioner's Petition for Discretionary Review in the Supreme Court of California, which denied the Petition without opinion. Appendix, at 1a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEAL DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT: *DESPER v. STARVED ROCK FERRY COMPANY, CHANDRIS, INC. v. LATSIS,* AND *McDERMOTT INTERNATIONAL, INC. v. WILANDER*

A. *Desper v. Starved Rock Ferry Company* and the "Expectant Seaman" Doctrine

The Court of Appeal relied on a theory rejected by this Court. The future assignments, which an employee might expect after his accident, may not be considered in determining seaman status. *Desper v. Starved Rock Ferry Company*, 342 U.S. 187, 191 (1952) (the Jones Act "does not cover probable or expectant seamen but seamen in being. . . . 'The fact that [an employee] had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature.' "). This rule has become entrenched as a rejection of the "expectant seaman" doctrine. A reason for the rejection is the impropriety of considering events

which might have but did not occur, a set which is very large and uncertain.

Thus, the decision of the Court of Appeal conflicts with relevant law established by this Court.

B. *Chandris, Inc. v. Latsis* and the Substantial Connection Requirement for Seaman Status

The test whether an employee is a seaman or not, a question of federal law, has been largely settled by several recent decisions of this Court. The test has two parts:

> [1] the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and
>
> [2] the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

Chandris, Inc. v. Latsis, —— U.S. ——, 115 S. Ct. 2172 (1995). It "is not the employee's particular job that is determinative, but the employee's connection to a vessel" that is determinative. *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 354 (1991).

Thus, this Court's decision in *Latsis,* —— U.S. ——, 115 S. Ct. at 2190, required Respondent to prove that a substantial portion of the time he worked for Petitioner was spent aboard vessels in navigation owned or operated by Petitioner. The Court of Appeal invoked the wrong test when it considered Respondent's future assignments. Respondent invoked the wrong test when he offered evidence relating to one assignment alone:

> Mr. Hillsman: In my view, the cutoff is the plaintiff's assignment at the time of the accident. In this circumstance we take the position a Jones Act seaman's status sinks or swims with assignment at the time of the accident.

RT 934-35, in Appendix, at 33a. The test invoked by Respondent is known as the "voyage test," a test expressly rejected by the Supreme Court in *Latsis* ("we must reject the initial appeal of . . . a 'voyage' test and undertake the more difficult task of developing a status-based standard").

Petitioner, on the other hand, urged the test adopted by this Court in *Latsis,* —— U.S. ——, 115 S. Ct. at 2190, that Respondent's entire employment with Petitioner be considered, and offered evidence of Respondent's assignments throughout his employment with Petitioner. That evidence shows that Respondent did not have the required connection to a vessel in navigation. For example, Exhibits E-1 and E-2, Appendix, at 25a, 26a, show that Respondent dived primarily from piers, beaches, surfboards, dams, and fixed platforms. Respondent testified that the "great majority" of his dives for Petitioner were not from an identifiable vessel or group of vessels owned or controlled by Respondent. RT 951, lines 13-26, in Appendix, at 34a. The record shows Respondent is not a seaman because far less than 30 percent of his dives, a touchstone for showing the required connection,[3] were from a vessel. RT 259, 1280, in Appendix, at 28a, 35a; CT 165-66 in Appendix, at 38a.

Thus, Petitioner and the trial court applied the correct rule for the employment-related connection required for seaman status. The Court of Appeal applied a rejected rule.

C. *McDermott International, Inc. v. Wilander* and the Rejection of an Employee's Particular Job as Determinative of Seaman Status

The Court of Appeal's opinion, at 5-6, Appendix, at 2a, cites cases involving divers to support its conclu-

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[3] This Court recognized that the courts "have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Latsis,* 115 S. Ct. at 2191.

sion that Respondent is a seaman. Doing so is in conflict with this Court's decision in *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 354 (1991), reaffirmed in *Latsis,* that "it is not the employee's particular job that is determinative, but the employee's connection to a vessel." Thus, to ask whether divers are seamen is to ask the wrong question. Sometimes they are and sometimes they are not.[4] Whether they are turns on the nature and duration of their connection to a vessel. Under the Supreme Court's decisions in both *Wilander* and *Latsis,* plainly a diver cannot *per se* be a Jones Act seaman.

Thus, the Court of Appeal's decision conflicts with no fewer than three relevant decisions of this Court. Petitioner respectfully submits that this Court should grant this Petition because the doctrine of *stare decisis*—that courts are guided by "fixed principles" and "impersonal rules of law," and not mere "personal impressions" of judges—is a question of the first importance. *Brown v. Allen,* 344 U.S. 433, 532, 535 (1953) (Jackson, J., concurring).

II. THE COURT OF APPEAL DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS IN *HEISE v. FISHING COMANY OF ALASKA, INC.* AND THE SIXTH CIRCUIT COURT OF APPEALS IN *ANTUS v. INTEROCEAN S.S. COMPANY*

The Court of Appeal applied a rule directly in conflict with that applied by the Ninth and Sixth Circuit Courts of Appeals, the rule rejecting the "expectant seaman" doctrine. *Heise v. Fishing Company of Alaska, Inc.,* 79 F.3d 903, 906 (9th Cir. 1996) ("The fact that *if* [plaintiff] performed well he *might* be hired to work on the

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[4] Petitioner's briefs cited cases, antedating *Latsis,* which held that divers were not seamen. Respondent's Brief in the Court of Appeal, at 6; Cross-Appellant's Brief in the Court of Appeal, at 6.

ship when it left Seward *if* there were jobs available does not change his land-based status at the time the injury occurred."); *Antus v. Interocean S.S. Company*, 108 F.2d 185, 187 (6th Cir. 1939) ("The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature."). *See also Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84, 87 (N.D. Cal. 1978) ("plaintiff's assertions that . . . he intended to resume [seaman status] at some point in the future, even if true, do not determine the issue before this Court [seaman status]"); *Sullivan v. American President Lines, Ltd.*, 206 F. Supp. 547 (N.D. Cal. 1961) ("The mere fact that Sullivan . . . might have become a 'crew member' some time after his injury is immaterial here").

Maritime law, which affects national and international maritime commerce, is a creature of federal law, and requires uniformity in its interpretation. The conflict created by the Court of Appeal should be reversed.

III. THE COURT OF APPEAL DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT AND WHICH IN RELATED FORM IS BEFORE THIS COURT THIS TERM

This Court has not decided, since its decision in *Latsis*, the scope of employment that a court should consider in determining the substantial connection requirement of seaman status. That question could usefully be answered in this case, where there is a detailed record showing Respondent's work assignments during his employment with Petitioner.

Respondent tried his case on the basis of the "voyage test", expressly rejected by this Court in *Latsis*. See Part I(B) *supra*. Petitioner tried this case on the theory that the relevant employment-related connections to vessels in navigation included Respondent's assignments throughout

his employment with Petitioner. Those assignments show that Respondent did not have the substantial connection to a vessel required by this Court in *Latsis*. See Part I(B) *supra*.

The Court of Appeal took yet a different tack, and held that the relevant employment-related connections to vessels in navigation included the assignment at the time of injury, together with the future assignments which Respondent might have expected. This is the "expectant seaman" doctrine, rejected by this Court as shown in Part I(A) *supra*.

The Ninth Circuit Court of Appeals, in *Papai v. Harbor Tug & Barge Company*, 67 F.3d 203 (9th Cir. 1995), review of which was granted by this Court on October 1, 1996, *Harbor Tug & Barge Company v. Papai*, —— U.S. ——, 117 S. Ct. 36 (1996), held that the relevant employment-related connection to vessels in navigation could be established by considering a plaintiff's work assignments not only with his employer at the time of his injury, but with multiple employers. This decision is at odds with Jones Act precedent, and with common sense. For example, this Court has approved an analysis based on vessel-related employment as a proportion of all employment with a defendant employer, with less than 30 percent not satisfying the requirement. See *Latsis*. An employer, who must select insurance coverage for its anticipated risks, cannot identify its risks and therefore the coverage it requires when doing so turns on its employees' assignments with other employers. A similar difficulty occurs under the rule of the Court of Appeal in this case: the proportion of vessel-related assignments, if it is a proportion of the assignment at the time of injury together with future assignments which do not occur, cannot be determined. Petitioner does not advocate a bright-line test, but the Court of Appeal's test provides no identifiable line at all.

Thus, the scope of employment which a court must consider in determining seaman status is before this Court this term. Clarification of the substantial connection requirement of this Court's decision in *Latsis* is important to the jurisdictional balance, and to the burden which uncertainty imposes on scarce judicial resources and on the decisions which maritime employers and employees face. Without clarification, injured employees must file duplicative claims to avoid the risk of choosing the wrong forum, employers must carry duplicative insurance, and courts variously alter the jurisdictional balance struck by Congress in enacting the LHWCA and the Jones Act.

CONCLUSION

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari so as to establish a uniform rule on the scope of employment which must be considered in determining seaman status under the Jones Act, and to resolve the conflicts set forth herein.

Respectfully submitted,

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January 14, 1997

APPENDIX

APPENDIX

[Filed Oct. 16, 1996]

IN THE SUPREME COURT OF CALIFORNIA

S055885

GIL HOEFLICH,

Appellant

v.

MARTECH USA INCORPORATED,

Appellant

And Companion Case

First Appellate District, Division Five,
No. A069336/A072913

Appellant's petition for review DENIED.

/s/ George
Chief Justice

[Filed July 23, 1996]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

A069336, A072913

GIL HOEFLICH,
Plaintiff and Appellant,

v.

MARTECH USA, INC.,
Defendant and Appellant.

(San Francisco County
Super. Ct. No. 950673)

Plaintiff Gil Hoeflich appeals a judgment notwithstanding the verdict (JNOV) entered in favor of defendant Martech USA, Inc., in plaintiff's personal injury action. He also appeals an alternative order granting a new trial conditioned upon his consent to a reduction of damages. In a protective cross-appeal defendant appeals the judgment on special verdict in favor of plaintiff that preceded the JNOV. We reverse and remand as set forth below.

BACKGROUND

Defendant subcontracted to perform all underwater diving services for an undersea sewer extension project

of the City of San Diego,[1] and plaintiff was a commercial diver employed by defendant. Sometime before plaintiff was assigned to work on the project, defendant had anchored its tugboat, the *Arctic Carolyn*, two and one-half miles offshore to hold her motionless directly above the terminus of the sewer outfall. Prior to this assignment plaintiff did the majority of his diving from nonvessels or vessels not owned by defendant. On his first dive in conjunction with this project, plaintiff struck and severely injured his left foot with a "water blaster" tool.

Plaintiff's complaint contained six causes of action: (1) negligence under the Jones Act (46 U.S.C., Appen. § 688); (2) unseaworthiness under general maritime law; (3) entitlement to maintenance and cure under general maritime law; (4) vessel owner negligence under the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. § 901 et seq.); (5) peculiar risk under state law; and (6) general contractor negligence under state law. By special verdict the jury found (1) plaintiff was a Jones Act seaman; (2) defendant was negligent under the Jones Act; (3) defendant's Jones Act negligence was a legal cause of plaintiff's damages; (4) the *Arctic Carolyn* was unseaworthy; (5) the vessel's unseaworthiness was a legal cause of damage to plaintiff; (6) defendant was not negligent as a vessel owner; (7) there was comparative negligence on plaintiff's part; and (8) plaintiff's comparative negligence was a legal cause

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[1] The contract for the sewer project was awarded to Point Loma Constructors (PLC), a joint venture between the Morrison-Knudsen Corporation (M-K) and the Manson Construction & Engineering Company (Manson). PLC, M-K and Manson were all defendants at trial, but at the conclusion of the parties' cases the court directed a verdict in their favor. The directed verdict is not at issue in this appeal.

Nine months after plaintiff filed his complaint, defendant filed a petition for bankruptcy. The bankruptcy court granted plaintiff relief from the automatic stay so he could proceed with this case.

of his damages. The jury found that plaintiff sustained total damages of $1,753,944, and allocated $634,944 to lost earnings, $119,000 to future medical expenses, and $1,000,000 to pain and suffering. It apportioned 75 percent of fault to defendant and 25 percent to plaintiff.

After the court entered judgment on the special verdict, defendant moved for JNOV on the ground of insufficient evidence that plaintiff was a Jones Act seaman. Alternatively, it moved for new trial on the grounds of procedural irregularities during trial, excessive damages, accident or surprise, and verdict against the law.

The court issued an order granting JNOV on the ground that plaintiff was not a Jones Act seaman, insofar as he was not a member of the crew of a vessel in navigation when he was injured. Specifically, it found that "Although the *Arctic Carolyn* was a tug capable of ocean navigation, she was out of navigation and was moored, with the sole mission of serving as a dive platform, before plaintiff boarded her. That mission could equally well have been performed by a barge incapable of navigation. If plaintiff had been injured while helping the tug to move to its destination or to anchor there, Jones Act status would have been evident even though plaintiff was a diver rather than a member of the ship's company. But the tug was out of navigation before plaintiff arrived, and he did not further the tug's mission of providing a dive platform. Rather, he undertook his own different mission of working on the ocean floor."

The court also issued an alternative order conditionally granting a new trial on the ground of excessive damages, unless plaintiff consented to a reduction of $500,000 in noneconomic damages and a reduction of lost earnings by the amount defendant had already contributed thereto.

DISCUSSION

I

Plaintiff's principal contention is that the JNOV was improperly granted because there was sufficient evidence of his seaman status to permit recovery under the Jones Act.

In ruling on a motion for JNOV the trial court cannot weigh the evidence or determine the credibility of witnesses; it must view the evidence in the light most favorable to the verdict, giving the prevailing party the benefit of any conflicts in the evidence and drawing all reasonable inferences in support thereof. (*Hauter* v. *Zogarts* (1975) 14 Cal.3d 104, 110.)

The Jones Act provides a negligence action in either state or federal court for "any seaman" injured "in the course of his employment." (46 U.S.C., Appen. § 688(a); *Soucie* v. *Trautwein Bros.* (1969) 275 Cal.App.2d 20, 24.) However, the Jones Act does not define the term "seaman," a fact which has resulted in considerable litigation over the meaning of that term. (See, *e.g.*, *Chandris, Inc.* v. *Latsis* (1995) 515 U.S. —— [132 L.Ed.2d 314; 115 S.Ct. 2172; *McDermott International, Inc.* v. *Wilander* (1991) 498 U.S. 337 [112 L.Ed.2d 866; 111 S.Ct. 807].)

Chandris is the most recent attempt by the United States Supreme Court to define which maritime workers are seamen. In *Chandris* the court noted that not all maritime workers are eligible for Jones Act protection. "[T]he Jones Act inquiry is fundamentally status-based: land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore." (*Chandris, supra,* 132 L.Ed.2d at pp. 332-333.) "[T]he ultimate inquiry is whether the worker in ques-

tion is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." (*Chandris, supra,* 132 L.Ed.2d at p. 338.)

Chandris announced a two-pronged test for determination of seaman status under the Jones Act: (1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation, or to an indentifiable group of such vessels, that is substantial in terms of both its duration and its nature. (*Chandris, supra,* 132 L.Ed.2d at p. 337.) *Chandris* emphasized that the purpose of the second requirement was to "[S]eparate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." (*Ibid.*)

Plaintiff clearly satisfies the first *Chandris* requirement. As observed in *Wallace* v. *Oceaneering Intern.* (5th Cir. 1984) 727 F.2d 427, 436: "A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not . . . an art developed in land work and transposed to a marine setting." (Italics original; see also, *Pickle* v. *International Oilfield Divers, Inc.* (5th Cir. 1986) 791 F.2d 1237; *Hall* v. *Professional Divers of New Orleans* (E.D. La. 1994) 865 F.Supp. 363.) The *Arctic Carolyn's* mission was to support divers performing work on the underwater sewer outfall, and plaintiff's work as a diver was essential to that mission.

The dispositive inquiry here is whether plaintiff meets the second *Chandris* prong, i.e., whether his connection to the vessel from which he was diving at the time of his injury was sufficiently substantial in terms of both its duration and nature to afford him Jones Act protection.

Chandris did not provide a bright line for the second prong of its seaman test, but did hold that the test for seaman status is a mixed question of law and fact, and if reasonable persons applying the correct legal standard could differ as to whether the employee was a member of the crew, it is for the fact finder to decide. (*Chandris, supra,* 132 L.Ed.2d at p. 338.)

There was evidence here that plaintiff had a connection substantial in duration and nature to the *Arctic Carolyn* and other identifiable vessels in navigation. His assignment to the San Diego sewer project was expected to last approximately one year, with dives from the *Arctic Carolyn* and two seagoing barges. Even if they are not used primarily for transportation of people or goods, such craft may constitute vessels for Jones Act purposes. (See, e.g., *Gizoni* v. *Southwest Marine Inc.* (9th Cir. 1995) 56 F.3d 1138, 1142; *Blanchard* v. *Engine & Gas Compressor Serv.* (5th Cir. 1978) 575 F.2d 1140, 1142; *Boatel, Inc.* v. *Delamore* (5th Cir. 1967) 379 F.2d 850, 853; *Producers Drilling Company* v. *Gray* (5th Cir. 1966) 361 F.2d 432, 437.) Accordingly, we conclude the issue of plaintiff's status was for the jury, and that substantial evidence supports its verdict.

II

Plaintiff also challenges the new trial order. A court cannot grant a new trial on the ground of excessive damages unless it is convinced from the entire record, including reasonable inferences therefrom, that the jury should have reached a different decision. (Code Civ. Proc.,[2] § 657, subd. 7.) An order for new trial must state both the grounds for granting the motion and its reasons for granting the motion upon those grounds. (*Ibid.*) The purpose of the specification is to encourage careful deliberation by the court before granting a new trial, and the

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[2] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

creation of a sufficiently precise record to permit meaningful appellate review. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 931.) Reasons do not have to be elaborate. " '[A] concise but clear statement of the reasons why [the court] finds one or more of the grounds of the motion applicable' " to the case before it suffices. (*Id.* at p. 931-932, internal citations omitted.) The requirements of section 657 are also applicable to conditional new trial orders, in which a court grants a new trial on the ground of excessive damages unless the party in whose favor a verdict has been rendered consents to a reduction of the damages by an amount the court determines is fair and reasonable. (*Neal, supra*, at p. 931; § 662.5.)

In its order for new trial the court stated, "Plaintiff's injury was extremely painful and he suffered grievously during the extended course of treatment. The court nevertheless concludes that the assessment for pain and suffering is excessive at any figure above $500,000." Motions for new trial are measured by the abuse of discretion standard and are reversed only if a manifest and unmistakable abuse clearly appears. (*Jiminez* v. *Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387.) Insofar as this order contains *no* reasons for concluding the damages were excessive, it fails to comply with statutory requirements and thus constitutes an abuse of discretion. (See *Stevens* v. *Parke, Davis & Co.* (1973) 9 Cal.3d 51, 59-60; *Mercer* v. *Perez* (1968) 68 Cal.2d 104, 116; *Bigboy* v. *County of San Diego* (1984) 154 Cal.App.3d 397, 404; *Oberstein* v. *Bisset* (1976) 55 Cal.App.3d 184, 187.)

DISPOSITION

The judgment notwithstanding the verdict and the order granting a new trial are reversed, and the matter remanded with directions to enter judgment in accordance with the special verdict. Costs to Gil Hoeflich.

HANING, J.

We concur.

PETERSON, P.J.

ELY, J.*

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*Judge of the Superior Court of Solano County, sitting under assignment by the Chairperson of the Judicial Council.

OFFICE OF THE CLERK
CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION 5

A072913

HOEFLICH, GIL

v.

MARTECH INTERNATIONAL, INC., *et al.*

San Francisco County Super. Ct. No. 121995

REMITTITUR

I, Ron D. Barrow, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on July 23, 1996 has now become final.

Witness my hand and the Seal of the Court affixed at my office this Oct. 21, 1996.

RON D. BARROW
Clerk of the Court

R. H. SANDVIK
Deputy Clerk

OFFICE OF THE CLERK
CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION 5

A069336

HOEFLICH, GIL

v.

MARTECH INTERNATIONAL, INC., *et al.*

San Francisco County Super. Ct. No. 950673

REMITTITUR

I, Ron D. Barrow, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on July 23, 1996 has now become final.

Witness my hand and the Seal of the Court affixed at my office this Oct. 21, 1996.

RON D. BARROW
Clerk of the Court

R. H. SANDVIK
Deputy Clerk

[SEAL]

[Filed Aug. 13, 1996]

CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT
DIVISION 5

A069336

San Francisco County Super. Ct. No. 950673

HOEFLICH, GIL

v.

MARTECH INTERNATIONAL, INC., *et al.*

BY THE COURT:

The petition for rehearing is denied.

Date: Aug. 13, 1996

/s/ Peterson, P.J.
D.J.

[Filed Oct. 20, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., MARTECH USA INC, POINT LOMA CONSTRUCTORS, A Joint Venture, between Morrison Knudsen Corp. & Manson Construction & Engineering Co., MORRISON-KNUDSEN CORP., and MANSON CONSTRUCTION & ENGINEERING CO., RED & WHITE DIVING, INC., and DOES 1 THROUGH 25,

Defendants.

FINAL JUDGMENT

This action came on regularly for trial by jury on December 12, 1994, in Department X-1, Room 479, of the above entitled Court, the Honorable Winslow Christian presiding. The parties agreed before trial that this action should be dismissed as to defendant MARTECH INTERNATIONAL, INC., and the action against MARTECH INTERNATIONAL, INC. was dismissed. At the close of plaintiff's case, the Court directed a verdict in favor of defendants POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison Knudsen Corp. and Manson Construction & Engineering Company, MORRISON KNUDSEN CORP., and MANSON CONSTRUCTION & ENGINEERING COMPANY. The Court granted the mo-

tion of defendant MARTECH U.S.A., INC. for judgment notwithstanding the verdict.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff GIL HOEFLICH take nothing by reason of his complaint and that judgment be entered in favor of defendants MARTECH INTERNATIONAL, INC., POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison Knudsen Corp. and Manson Construction & Engineering Company, MORRISON KNUDSEN CORP., MANSON CONSTRUCTION & ENGINEERING COMPANY, and MARTECH U.S.A., INC., and that said defendants recover costs and disbursements from the plaintiff, Gil Hoeflich, in an amount to be determined by the Court in accordance with a Memorandum of Costs to be filed by said defendants.

Dated: October 17, 1995

/s/ Winslow Christian
WINSLOW CHRISTIAN
Judge of the Superior Court,
Assigned

[Filed Mar. 1, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

Case No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., *et al,*

Defendants.

ORDER GRANTING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, IN THE ALTERNATIVE, CONDITIONALLY GRANTING MOTION FOR NEW TRIAL

Background

Plaintiff was employed by defendant as a deep-sea diver for the purpose of performing various tasks connected with the extension of the City of San Diego's sewer outfall on the ocean floor off-shore from Point Loma. The whole effort comprised work planned to extend over many months. The first task assigned to Plaintiff was measurement and cleaning of the end of the existing pipe in preparation for attaching many pieces of concrete pipe in order to move the point of discharge farther from the shore. Plaintiff was hired for his job through his union and drove from his home in Santa Barbara to stay at a San Diego motel.

On the first morning of the job plaintiff went out to the seagoing tug Arctic Carolyn, owned by defendant. Before plaintiff's arrival the tug had been moored with several

anchors to hold it motionless directly above the end of the sewer outfall. Plaintiff descended to the ocean floor and, while working there, severely injured his foot through accidental misuse of a "water-blaster" tool.

Discussion

For this injury plaintiff is potentially covered by the tort-like remedies of the Jones Act if he is found to have been a crew member of a vessel in navigation. If he is not a Jones Act seaman, he is covered by the workers' compensation type of remedies afforded by the Longshore and Harbor Workers Act. Plaintiff has pursued Jones Act remedies, but the LHWA remedies are still available.

Trial by jury resulted in a verdict (in the form of jury responses to pertinent interrogatories) awarding an aggregate sum of $1,753,944 reduced by 25% on the jury's assessment of proportional contribution to causation by negligence on the part of plaintiff.

Defendant has moved for judgment notwithstanding the verdict and for new trial. A further motion by defendant, to vacate or correct the verdict or the judgment, need not be reached.

Fundamental to the verdict is the jury's finding that plaintiff was a Jones Act seaman; *i.e.*, he was injured while he was a member of the crew of a vessel in navigation. The court has concluded that the finding is not supported by any substantial evidence. Although the Arctic Carolyn was a tug capable of ocean navigation, she was out of navigation and was moored, with the sole mission of serving as a dive platform, before plaintiff boarded her. That mission could equally well have been performed by a barge incapable of navigation. If plaintiff had been injured while helping the tug to move to its destination or to anchor there, Jones Act status would have been evident even though plaintiff was a diver rather than a member of the ship's company. But the tug was out of navigation

before plaintiff arrived, and he did not further the tug's mission of providing a dive platform. Rather, he undertook his own different mission of working on the ocean floor. The court concludes that plaintiff was, as a matter of law, not a Jones Act seaman.

Because the ruling on Jones Act status may be challenged on appeal, it is appropriate to consider the motion for new trial. There was indeed, as defendant contends, misconduct in the closing argument of counsel for plaintiff:

> a. Counsel improperly assured the jury of his own belief in the veracity of plaintiff.
>
> b. Counsel asked the jurors to "walk a mile in [plaintiff's] shoes" when assessing pain and suffering.
>
> c. Although punitive damages are not a factor in the case, counsel broadly and improperly hinted at an exemplary or punitive function for general damages, referring to evil persons responsible for the death of astronaut Christa McAuliffe and to the deterrent effect of jury awards in auto safety litigation. The apparent implication was that comparable evil on the part of defendant deserved punishment in the form of a high award of general damages.

Although these statements were improper, objections were promptly and sharply sustained; the court has concluded that the verdict was probably not affected. Therefore, a new trial need not be granted on the basis of attorney misconduct.

The defense challenges all three elements of the damage award:

Lost earnings	$ 634,944
Future medical expense	119,000
Pain and suffering	1,000,000
	$1,753,944
Less 25% for plaintiff's contributory negligence	- $1,315,458 net

The award for lost earnings has adequate support in the evidence; it is sustained, except that the court concludes that defendant is entitled to credit in the amount of $29,700, against lost earnings, for payments already made. The award for future medical expenses is also sustained. Plaintiff's injury was extremely painful and he suffered grievously during the extended course of treatment. The court nevertheless concludes that the assessment for pain and suffering is excessive at any figure above $500,000.

The other challenges asserted by defendant are unmeritorious or need not be reached.

Rulings

1. The motion for judgment notwithstanding the verdict is granted on the ground no substantial evidence supports the determination of the jury that plaintiff was a Jones Act seaman.

2. Alternatively, the motion for new trial is conditionally granted on the ground of excessive damages. If plaintiff consents to a reduction of the damage award to give defendant credit for $29,700 already paid toward lost earnings and to assess pain and suffering at $500,000, the motion for new trial is denied. The aggregate net award after such reduction shall give effect to the finding of $25% contributory negligence.

3. In all other respects defendant's motions are denied.

DATED: February 28, 1995.

/s/ Winslow Christian
WINSLOW CHRISTIAN

[Filed Jan. 13, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Case No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., MARTECH USA INC., POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison-Knudsen Corp. and Manson Construction & Engineering Co., MANSON CONSTRUCTION & ENGINEERING CO., and DOES 1 THROUGH 25,

Defendants.

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial by jury on December 12, 1994, in Department X-1, Room 479, of the above-entitled Court, the Honorable Winslow Christian presiding. The plaintiff appeared in person and by his attorney, John R. Hillsman, of McGuinn, Hillsman & Palefsky, and the defendant, MARTECH USA, INC., appeared by George Koelzer and Matthew Kesner of Lane Powell Spears & Lubersky.

A panel of twelve persons was impaneled and sworn. Witnesses were sworn and testified. After being duly instructed by the Court, the jury deliberated, and thereafter duly returned the Special Verdict, a true copy of which is attached hereto as Appendix A.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered

in favor of the plaintiff Gil Hoeflich in accordance with that Special Verdict; that plaintiff Gil Hoeflich recover costs and disbursements from defendant Martech USA, Inc. in an amount to be determined by the Court, under C.C.P. §§ 1032 and 998; and that he receive interest thereon at the rate of 10% per annum.

Dated: 13 January 95

/s/ Christian
THE HONORABLE WINSLOW CHRISTIAN,
Justice of the California Court of Appeal,
Retired, Judge of the Superior Court,
Pro Tempore

[Filed Jan. 5, 1995]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY SAN FRANCISCO

Case No. 950673

GIL HOEFLICH,

Plaintiff,

v.

MARTECH INTERNATIONAL, INC., MARTECH USA INC., POINT LOMA CONSTRUCTORS, A Joint Venture between Morrison-Knudsen Corp. and Manson Construction & Engineering Co., MANSON CONSTRUCTION & ENGINEERING CO., and DOES 1 THROUGH 25,

Defendants.

SPECIAL VERDICT FORM

We, the jury in the above-entitled case, find the following special verdict on the following questions submitted to us:

QUESTION NO. 1:

1. Was the Plaintiff a Jones Act seaman?

ANSWER: Yes 12

No 0

(If you have answered question number 1 "yes," go on to question number 2. If you have answered question number 1 "no," go directly to question number 6).

QUESTION NO. 2:

2. Was defendant Martech USA guilty of Jones Act negligence?

ANSWER: Yes 12

No 0

(If you have answered question number 2 "yes," go on to question number 3. If you have answered question number 2 "no," go directly to question number 4.)

QUESTION NO. 3:

3. Was that Jones Act negligence a legal cause of damage to the Plaintiff?

ANSWER: Yes 12

No 0

(Go on to question number 4.)

QUESTION NO. 4:

4. Was the ARCTIC CAROLYN unseaworthy?

ANSWER: Yes 12

No 0

(If you have answered question number 4 "yes," go on to question number 5. If you have answered question number 4 "no," go directly to question number 6.)

QUESTION NO. 5:

5. Was that unseaworthiness a legal cause of damage to the Plaintiff?

ANSWER: Yes 12

No 0

(Go on to question number 6.)

QUESTION NO. 6:

6. Was defendant Martech USA guilty of vessel owner negligence?

ANSWER: Yes 2

No 10

(If you have answered question number 6 "yes," go on to question number 7. If you have answered both question numbers 1 and 6 "no," sign and date your verdict form and return it to the clerk. If you have answered question number 6 "no," but have answered question numbers 3 or 5, or either of them "yes," go directly to question number 8.)

QUESTION NO. 7:

7. Was that vessel owner negligence a legal cause of damage to the Plaintiff?

ANSWER: Yes

No

(Go to question number 8.)

QUESTION NO. 8:

8. Without taking into consideration the reduction of damages due to the comparative fault of the plaintiff, if any, what do you find to be the total amount of damages suffered by the plaintiff?

ANSWER:	(a) Lost Earnings	$ 634,944
	(b) Future Medical Expenses	$ 119,000
	(c) Pain and Suffering	$1,000,000
	TOTAL	$1,753,944

(Go on to question number 9.)

QUESTION NO. 9:

9. Was there comparative negligence on the part of the plaintiff?

ANSWER: Yes 12
No 0

(Go to question number 10.)

QUESTION NO. 10:

10. Was the plaintiff's comparative negligence a legal cause of his damages?

ANSWER: Yes 12
No 0

(Go to question number 11.)

QUESTION NO. 11:

1. Assuming that 100% represents the total causes of the plaintiff's damages, what percentage of this 100% is attributable to the fault of defendant Martech USA, and what percentage of this 100% is attributable to the fault of the plaintiff?

ANSWER: To defendant Martech USA 75%
To plaintiff Hoeflich 25%
Total 100%

(Sign and date you verdict form and return it to the clerk.)

Dated: 1-5-95

/s/ [Illegible]
Foreperson

DATE	JOB	LOCATION	DIVED FROM	OWNED BY
9-92	Point Loma Project	San Diego, CA	M/V ARCTIC CAROLYN	Martech USA, Inc.
1-23-92	"Durocher"	Shore	Shore	Martech
2-17-92	Unocal	Mandalay	Beach	Not Martech
2-7-92	"Durocher"	Near Shore	Barge	Martech
2-26-90	Boise Cascade	Minnesota	Shore and non-self-propelled barge	Not Martech
2-1-90	Riedel	Lasflores	Beach	Not Martech
6-23-89	Unocal	Platform	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
6-1-89	PG&E	Iron Canyon Dam	Dam	Not Martech
5-6-89	Unocal	Platform C	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
4-11-89	Unocal	Vandenburg Air Force Base	Surfboard	
12-12-88	PG&E	Pit River, Burney, CA	Pit 3	Not Martech
12-12-88	PG&E	Pit River, Burnen, CA	Truck (not a vessel in navigation)	
10-30-88	Unocal	Vandenburg Air Force Base	Beach	Not Martech
7-25-88	Texaco	P/L Removal - Beach	Toby Tide	Not Martech

25a

EXHIBIT E1

6-17-88	Texaco	Helen	D/B Martinez (non-self-propelled barge)	Not Martech
1-26-88	ARCO	Platform Holly	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
3-1-89	Salt River	Horse Mesa Dam	Horse Mesa Dam	Not Martech
2-07-89	Unocal	Vandenburg Air Force Base	Beach and vehicle with balloon tires	Not Martech
7-87	L/P	Samoa	Effluent Outfall	Not Martech
3-03-87	Unocal	Platform A	Fixed Platform (permanent-ly attached to sea bottom)	Not Martech
While working for Martech in CA		California	Piers; Beaches; Vessels time-chartered by Martech; Dams; Surfboards; Non-Selfpro-pelled barges (deposition transcript 175-77)	Not Martech

EXHIBIT E2

[Excerpts from Reporter's Transcripts of Proceedings
Volumes II, III, V, VI, VII and VIII]

[167] IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

BEFORE THE HON. WINSLOW CHRISTIAN, ASSIGNED

No. 950673

GIL HOEFLICH,
Plaintiff,

vs.

MARTECH INTERNATIONAL, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME II

December 13, 1994

* * * *

[259] Q. And did you remain steadily employed with Martech throughout your employment in the dive industry, or did you work for other employers?

A. [PLAINTIFF] In the Gulf of Mexico, primarily Martech. When I came out to California it was, I'd have to say, around 99 percent Martech.

Q. When did you come to California?

A. I believe that was in '85. Around there.

Q. And when you worked for Martech, what types of work did you do for them? What were your jobs with Martech?

A. Both in the Gulf and in California?

Q. Let's talk about California. For example, did you ever work in the shop?

A. Yes. Loading out jobs, working on some of their equipment.

Q. You were present when John Sabo testified?

A. Yes.

Q. He told us that he worked for Martech as a diver/mechanic.

A. Yes.

Q. You recall that he indicated he worked steadily for the company in the shop between dive jobs. Was that your experience?

A. No.

* * * *

[398] VOLUME III

December 14, 1994

* * * *

[437] THE COURT: Come to side bar.

MR. KOELZER: In fairness to all concerned, I want to do that.

(A discussion was had at the bench, not within hearing of the court reporter.)

MR. HILLSMAN: Thank you very much. That's all I have.

Thank you, Your Honor.

MR. KOELZER: Is 27 in evidence?

THE COURT: No. It was marked for identification.

MR. KOELZER: Is it going to be offered?

THE COURT: So far, it hasn't been.

MR. KOELZER: I am trying to inquire of my adversary through the court.

MR. HILLSMAN: I would be happy to make an offer of proof now.

THE COURT: It is not in evidence now.

You are not under pressure to offer it.

You may proceed.

MR. KOELZER: I shall be as prompt as I can.

CROSS-EXAMINATION

MR. KOELZER: Q. Mr. Roche, in September of 1992, Martech owned several vessels; is that correct?

A. [TED ROCHE, V.P. Martech, USA, Inc.] Yes. [438] Q. And one of them was the Arctic Carolyn, wasn't it?

A. That is correct.

Q. Was the Arctic Carolyn certified, inspected by the Coast Guard?

A. Yes.

MR. KOELZER: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. KOELZER: Defendants' Exhibit F, Your Honor.

THE COURT: Very well.

MR. KOELZER: It will save time if you have that in front of you.

Q. Look at the certificate. When was the Arctic Carolyn certified by the Coast Guard prior to the Hoeflich accident? Upper right corner.

A. 21 May '92.

Q. A little more than three months before the accident; is that correct?

A. That is correct. It was originally certificated long before that.

Q. 1978, when she was built?

A. Right.

Q. And by certificated by the Coast Guard, you mean it is inspected on a regular schedule promulgated by the Coast Guard?

A. That is correct.

[439] Q. Like your license plate on your car, they have to be renewed?

A. It is a little more lengthy than that.

Q. Of course, it is. But it has to be renewed because of the service the boat is being put to?

A. Right. If you have a vessel and you want to maintain a certificate, you have to go through numerous inspections. Besides the life-saving equipment, there is annual drydocking required.

Q. Lots of things.

A. Right. Very expensive.

Q. In the certificate of inspection, does the Coast Guard set forth the crew of the vessel?

A. Yes. The manning, yes.

Q. What was the crew of the vessel as required by the Coast Guard?

A. The minimum crew is a five-man crew.

Q. Consisting of what?

A. One licensed master.

Q. Stop.

Was Gil Hoeflich the licensed master of the Arctic Carolyn?

A. No.

Q. What next?

A. Licensed mate.

Q. How many?

A. One.

Q. And was Gil Hoeflich a licensed mate?

[440] A. No.

Q. What next?
A. One chief engineer.
Q. Was Gil Hoeflich a chief engineer?
A. No.
Q. What else?
A. One ablebodied seaman.
Q. Was Gil Hoeflich an ablebodied seaman on the Arctic Carolyn?
A. No.
Q. What else?
A. One ordinary seaman.
Q. Was Gil the ordinary seaman?
A. No.
Q. Did that comprise the entire crew of the Arctic Carolyn?
A. Yes.
Q. Each of these crew members had papers?
A. Fully licensed, yes.
Q. You have known Mr. Hoeflich approximately ten years; is that right?
A. That is correct.
Q. You worked with him on many occasions?
A. That is correct.
Q. Did you ever know Gil Hoeflich to have Coast Guard papers?
A. No.
Q. Now, did Martech own other vessels?
[441] A. Yes.
Q. What else?
A. We owned two tugs.
Q. Stop right there.
A. Okay.
Q. Were those tugs certified by the Coast Guard?
A. No, not inspected. They are licensed crews.
Q. The people who comprised the crew had Coast Guard licenses?
A. Yes.

Q. Was Gil ever a member of the crew of either of those tug boats?

A. No.

Q. Ever?

A. No, sir.

Q. What other vessel did Martech own?

A. We owned another tug and an unprepped barge. Two. One was a tank barge for carrying liquid product, and one a construction barge.

Q. The tank barge and the crew barge were unmanned vessels; is that correct?

A. Yes.

Q. They didn't have a crew.

A. No.

Q. Am I correct?

A. While they were underway, they did not have [442] a crew on board.

Q. And did they also own a crew boat?

A. Yes.

Q. Did the crew boat have a crew?

A. Yes.

Q. Licensed people?

A. Yes.

Q. Was Gil Hoeflich ever a member of the crew of the crew boat?

A. No.

Q. Another tug boat?

A. Lorie Ann.

Q. Was Gil Hoeflich a member of the crew of that boat?

A. No.

Q. Would you agree that never in his employment with Martech was he never a member of crew of a vessel owned by Martech?

A. That is true.

Q. Would you agree that the majority of the dive operations were not from these vessels or other vessels;

most of the diving done by Martech was not done off vessels?

A. The Carolyn was new to the coast. We purchased her and brought her down. In fact, that was the first diving operation ever conducted from that vessel.

* * * *

[724] VOLUME V

December 19, 1994

* * * *

FURTHER RECROSS-EXAMINATION

Q. To your knowledge, the only connection Hoeflich ever had with the Arctic Carolyn was the diving that he did in connection with the Point Loma job, the diving he did on the afternoon of September 9, 1992; is that correct?

A. [ED THOMAS, Martech Diving Supervisor] That is correct.

* * * *

[913] Q. Sir, did you consider yourself to be a member of the crew of the Arctic Carolyn?

A. [PLAINTIFF] No.

* * * *

[934] MR. HILLSMAN: In my view, the cutoff is [935] the plaintiff's assignment at the time of the accident.

In this circumstance we take the position a Jones Act seamans status sinks or swims with assignment at the time of the accident.

Keith vs. S.S. Goldstone, 81 Cal.App.3d 699, the language at 704, in this Court. California courts are obliged to follow the Ninth Circuit rule. Where there is a conflict among the circuits, the Court will find the rule is that the fleet seaman doctrine does not apply, that a seaman's status is determined solely from assignment at the time of the injury.

* * * *

[939] VOLUME VI

December 20, 1994

* * * *

[951] You came to the west coast in, I believe it was, 1985; is that correct?

A. [PLAINTIFF] Sounds right.

Q. The great majority of your diving work you did for Martech on the west coast was not from the Arctic Carolyn, the tug boat, the crew boat, or the barges; most was from other sorts of vessels or nonvessels, wouldn't you agree?

A. Yes. They didn't buy those boats until years later.

Q. Wouldn't you agree most of your dives for Martech was not from these vessels I just enumerated? Isn't that true?

A. Yes.

* * * *

[954] Q. You never have held papers, Coast Guard papers, as a seaman or a master or a mate or anything like that; is that correct?

A. [PLAINTIFF] I do now.

Q. I said perhaps I am—forgive me. I phrased badly. Prior to September 9, 1992, did you ever hold papers as an ablebodied seaman, an ordinary seaman, a mate, a master, any other sort of papers issued by the Coast Guard?

A. No.

* * * *

[955] Q. Perhaps my question wasn't clear. Prior to September 9, 1992, did you have any sort of Coast Guard papers such as I described? Yes or no.

A. [PLAINTIFF] No.

* * * *

[1114] VOLUME VII

December 21, 1994

* * * *

[1120] [PLAINTIFF'S COUNSEL] If Your Honor does not feel that that is sufficient connection—although

I believe, as I will explain in a moment, it is—the evidence is also clear that had he not been injured, this was a key employee who would have continued to work aboard the vessels Haakon and Betty L, if the permanent assignment requirement is indeed a factor in dive cases.

I respectfully submit it isn't. I cite the seminal Fifth Circuit Appellate decision of Wallace v. Oceaneering. The Court will find the key language at 727 F.2d 436, where it was held that a commercial diver who embodies the traditional and inevitable task of navigation has the legal protections of a seaman when a substantial part of his duties are performed on vessels. It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes a diver a seaman.

* * * *

[1172] VOLUME VIII

January 3, 1995

* * * *

[1280] [DEFENDANT'S COUNSEL] One of the things you look for is the course of work over the years that Mr. Hoeflich worked for Martech. There is an Exhibit E put into evidence. And I have a copy of it. You will have this in the jury room. It is a list of the various jobs, with the dates, that Mr. Hoeflich had when he was working for Martech.

You are asked to accept that he was at all times a crew member, or was a crew member, rather, on September 9, 1992.

And you look at his work history.

On the job in Point Loma he was diving from the Arctic Carolyn the day the accident happened. True.

Earlier that year, on a job called Derocher, he dove from the shore. In February '92, working for Unocal,

he dove from the beach. Again, in February, he dove from a barge. On the Boise Cascade job, he dove from shore and a non-self-propelled barge. From the beach. A fixed platform. From a dam in June of '89, when doing work for PG&E. In May of '89, working for Unocal, [1281] a fixed platform. April of '89, dove from a surf board. PG&E, from a truck, in December of '88. In October of '88, Unocal, from a beach. In July of '88 working for Texaco, from something called Toby-Tide, non-self-propelled barge. A fixed platform. From a dam in '89. From a beach and a vehicle with balloon tires, hardly a vessel. In '87, he dove from an effluent outfall. From a fixed platform. While working for Martech in California, from piers, beaches, vessels, time-chartered by Martech, that is, to say Martech didn't own the vessels, dams, surfboards, non-self-propelled barges.

All of this is in evidence.

Mr. Hoeflich, whatever he was, was not a member of the crew of the Arctic Carolyn.

* * * *

[Filed Jul. 31, 1995]

COURT OF APPEAL
FIRST APPELLATE DISTRICT
STATE OF CALIFORNIA

AO 69336 DIV 5
SCN 950673

GIL HOEFLICH,
Plaintiff/Appellant/
X-Respondent

VS

MARTECH INTERNATIONAL, INC.,
Defendant/Respondent/
X-Appellant

CLERK'S TRANSCRIPT ON APPEAL

From a Judgment of the Superior Court
of the State of California,
In and for the City and County of San Francisco

Appeal Filed on 3-8-95 X-Appeal Filed 3-28-95

HONORABLE WINSLOW CHRISTIAN

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* * * *

[165] Q. Did Martech in California have a fleet of vessels that it owned?

A. [PLAINTIFF] They did, yes.

Q. Which vessels did Martech in California own?

A. The ARCTIC CAROLYN. They have a tug boat, I can't remember their name; a crew boat; a barge or two; a variety of inflatable boats. And I think that's about all I know of right now.

Q. You would say, though, that less than 50 percent of your diving activities were performed from those vessels, correct?

A. From the Martech vessels?

Q. Yeah.

MR. HILLSMAN: During what time period are we talking about?

MR. KESNER: While he's in California.

MR. HILLSMAN: The question, as it goes to you, Gil, is was less than 50 percent of your overall dive activities for Martech in California waters from those [166] vessels.

THE WITNESS: I would say so, yes.

MR. KESNER: Q. Were less than 25 percent of your dives made from those vessels?

MR. HILLSMAN: I'm sorry. With the same parameters?

MR. KESNER: Yes.

THE WITNESS: I would have to say so, yes, because they haven't had their fleet for that many years.

* * * *

TITLE 46 APPENDIX. SHIPPING
CHAPTER 18. MERCHANT SEAMEN PROTECTION AND RELIEF

46 USCS Appx § 688 (1996)

§ 688. Discovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

* * * *

Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

No. 96-1112

In The

Supreme Court of the United States

October Term, 1996

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

We respectfully submit that the Petition misstates the question for review and that, if there be one at all, it should read as follows:

> Where, as here, the plaintiff was a freelance diver whom the defendant employer only hired on a project by project basis, must his Jones Act seaman status be determined solely from an examination of his overall service with that employer, as petitioner contends, or may it be affirmed on the basis of the year-long shipboard assignment he held at the time of his injury, as the lower court ruled?

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SUMMARY OF ARGUMENT

This was an unsung state court Jones Act[1] case. The decision below wasn't even published. There is nothing "cert-worthy" about it. The question it poses is nowise related to the ones presented in *Harbor Tug & Barge Co. v. Papai*,[2] and was answered almost two years ago in *Chandris, Inc. v. Latsis*.[3]

The *Chandris* case, of course, reminded us that seaman status under the Jones Act is a mixed question of law and fact that should be left to the jury whenever reasonable people could differ over whether the plaintiff (1) contributed to the mission of a vessel, and (2) enjoyed an employment-related connection to a vessel, or fleet of vessels, that was substantial in both its duration and its nature.[4] The jury in this case found that respondent Gilson Hoeflich ("Hoeflich") was a Jones Act seaman by a vote of twelve to nothing.[5] That finding was affirmed by the California court of appeal because "[t]here was evidence here that plaintiff had a connection substantial in duration and nature to the [tugboat] *Arctic Carolyn* and

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[1] According to that statute: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . ." 46 U.S.C. § 688(a).

[2] *cert. granted*, ___ U.S. ___, 117 S.Ct. 36 (1996).

[3] ___U.S.___, 115 S.Ct. 2172 (1995).

[4] *Id.* at 2190.

[5] *Petitioner's Appendix, p. 21a.*

two seagoing barges."[6] Moving under 28 U.S.C. § 1257, petitioner Martech USA, Inc. ("Martech") seeks a writ of certiorari from that unpublished opinion on grounds:

> First, that it conflicts with this Court's rulings in *Desper v. Starved Rock Ferry Co.*[7] and *Chandris, Inc. v. Latsis;*[8]
>
> Second, that it conflicts with the lower federal court rulings in *Heise v. The Fishing Company of Alaska, Inc.,*[9] and *Antus v. Interocean S.S. Co.;*[10] and,
>
> Third, that it poses an important federal question similar to the ones currently before this Court in *Harbor Tug & Barge Co. v. Papai.*[11]

We respectfully urge this Court to deny Martech's petition.

First of all, far from conflicting with *Chandris*, the opinion below followed that decision *verbatim*. Respondent Hoeflich was a freelance diver who worked for Martech on a project-by-project basis. His basic assignment thus changed from one hire to the next. The accident at bar occurred during a shipboard assignment to the seagoing tugboat *Arctic Carolyn*, shortly after Martech had hired him to work as its lead diver on the Point Loma Sewer Outfall Extension Project. Although Hoeflich was

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[6] *Petitioner's Appendix, p. 7a.*

[7] 342 U.S. 187 (1952).

[8] *supra.*

[9] 79 F.3d 903 (9th Cir. 1996).

[10] 108 F.2d 185 (6th Cir. 1939)

[11] *cert. granted,* ___ U.S. ___, 117 S.Ct. 36 (1996).

maimed on the first day of diving, his assignment to that project was slated to last for over a year, and required him to work, dive, live, eat and even sleep aboard an identifiable fleet of seagoing construction vessels. Turning a blind eye to that year-long vessel-nexus, petitioner contends that the state court should have looked, instead, to the other assignments Hoeflich received during his overall service with Martech. But as this Court explained in *Chandris*:

> "[W]e see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer. When a maritime worker's basic assignment changes, his seaman status may change as well. *See Barrett* [*v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1077 (5th Cir. 1986)] (Rubin, J., dissenting) ('An assignment to work as a crew member, like the voyage of a vessel, may be brief and the *Robison*[12] test is applicable in deciding the worker's status during any such employment') [Citation]. For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office

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[12] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

> and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea." *Chandris, supra,* 115 S.Ct. at 2191.

In sum, the decision below was in complete accord with *Chandris*.

Nor can Petitioner argue that it conflicted with *Desper v. Starved Rock Ferry Co.*,[13] *Antus v. Interocean S.S. Co.*,[14] or *Heise v. Fishing Company of Alaska, Inc.*[15] Unlike the plaintiffs in those cases, all of whom were shore-based shipyard workers injured in port while repairing vessels that had been laid up for the winter, Respondent Hoeflich was a deep sea diver crippled on the ocean floor while manning an operating tug two-and-a-half miles off the California coast. In short, the cases on which Martech floats its petition are distinguishable and inapposite.

The same may be said of Martech's suggestion that its petition is somehow related to the issues and arguments this Court heard last January 13 in *Harbor Tug & Barge Co. v. Papai*. Certiorari was granted in *Papai* to decide: (1) Whether an injured maritime worker could still prosecute a Jones Act claim after an administrative law judge had formally determined that he was not a seaman, but an LHWCA[16] beneficiary at the time of his accident, and if so; (2) Whether the inquiry into that

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[13] *Supra*.

[14] 108 F.2d 185 (6th Cir. 1939)

[15] 79 F.3d 903 (9th Cir. 1996).

[16] Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*.

worker's seaman status could extend to vessel-assignments he had received from employers other than the one in whose service he was injured. In contrast to the situation in *Papai*, Respondent Hoeflich was never awarded LHWCA benefits, or deemed a longshore worker, by an administrative law judge. Indeed, despite its sedulous insistence that he was an LHWCA beneficiary, Martech neither paid Hoeflich workers' compensation nor even notified its longshore carrier that he'd been injured. But unlike John Papai, Respondent Hoeflich tightened his belt, eschewed an interim administrative hearing and awaited his Jones Act jury. The state court was thus the first and only tribunal to consider his claims.

What is more, as even the petitioner points out, Hoeflich has insisted all along that his seaman status should "sink or swim" on the basis of his year-long reassignment as Martech's lead diver off Point Loma.[17] Unlike John Papai he never suggested to the jury, the court of appeal, or anyone else, that his seaman status could be gleaned from his service with other employers. As the verdict confirmed, he didn't have to.

Gilson Hoeflich was injured performing a classic seaman's job that involved a lengthy and continuous commitment to the mission of the Point Loma construction fleet. The jury therefore awarded him the protection of the Jones Act by a vote of twelve to nothing. Despite Martech's arguments before this Court, it is *not* paying him interim compensation under the LHWCA. In fact, its LHWCA carrier insists that Hoeflich was a Jones Act

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[17] *See Petition for Writ of Certiorari, pp. 7-8.*

seaman. Thus, until his Jones Act verdict can be executed, the Respondent must bear his disability on his own.

BASIS FOR JURISDICTION

Since the petition invokes jurisdiction under 28 U.S.C. § 1257, and since that statute only reaches "*[f]inal* judgments or decrees rendered by the highest court of a State in which a decision could be had",[18] it is worth noting that Martech is currently moving the trial court to vacate our judgment on grounds that it was void and premature.[19] Thus, even while it assures this Court that the state court judgment was "final" for the purposes of § 1257, Martech is telling the trial court that said judgment "is nonfinal because it does not dispose of the outstanding maintenance claim."[20] We don't share Martech's views,[21] and have opposed its motion to

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[18] [emphasis added].

[19] *See* Defendant's Notice of Motion and Motion to Vacate the 'Final Judgment After Appeal', or, in the alternative, to Stay Enforcement of the 'Final Judgment After Appeal', Respondent's Appendix pages (hereinafter referred to as "App.") 60-62.

[20] *See*, Memorandum of Points and Authorities in Support of Defendant's Notice of Motion and Motion to Vacate the 'Final Judgment After Appeal', or, in the alternative, to Stay Enforcement of the 'Final Judgment After Appeal', App. 63-68.

[21] Briefly, our complaint against Martech stated counts for Jones Act negligence, general maritime unseaworthiness, and maintenance and cure. All three counts, of course, state claims under federal maritime law. *See e.g., Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Because we ultimately withdrew the maintenance and cure count from the jury's consideration,

vacate.[22] But if we're wrong and Martech is right, the decision below is not strictly "final", because it leaves some loose ends in state court.[23] We only raise this point because the petitioner did not.

COUNTER STATEMENT OF THE CASE

The Jones Act was passed by Congress to offset " 'the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' "[24] This Jones Act case concerns an accident that befell Gilson Hoeflich on the ocean floor two-and-one half miles off Point Loma, California while he was diving from the *Arctic Carolyn* in the foul mouth of an undersea sewer. The unique submarine hazards he encountered there put an end to his career.

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and entrusted it to the trial judge for post verdict proceedings (*R.T. 1187-1188*), Martech contends that we "bifurcated" the trial. In Martech's view, the state court of appeal failed to take that bifurcation into account, and therefore acted precipitously, when it remanded the case back to the trial court "with directions to enter judgment in accordance with the special verdict." *Petitioner's Appendix, p. 8a.*

[22] In a nutshell, we contend that Hoeflich effectively waived the maintenance and cure count when he requested the directions that the court of appeal ultimately included in its remand.

[23] *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277-278 (1980). *See also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975).

[24] *McDermott Intern'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991).

Hoeflich had been a commercial diver since 1977.[25] Like most divers he worked freelance.[26] Though he dove several years for Martech, he was not a "steady" or "permanent" employee, but was hired on a project-by-project basis.[27] Just prior to the Point Loma project he'd been diving for a Canadian company on a salvage job in the Mediterranean.[28] But after winning a major diving subcontract to help extend the City of San Diego's Point Loma sewer outfall another three-and-a-half miles into the Pacific, Martech rehired Hoeflich for the dive team it was putting together.[29] The company engaged him as one of its "key personnel", for "the length" of the job, and recommended that he and his wife move to San Diego.[30] The project, after all, was slated to last for "over a year."[31] The construction, and all its attendant diving, would take place in 210 to 300 feet of water, between two-and-one-half and six miles offshore, from three specially equipped diving vessels – the tugboat *Arctic Carolyn* and the seagoing crane barges *Haakon* and *Betty L.*[32]

Martech's work began on September 9, 1992, and didn't wind down until November 24, 1993.[33] Once the project got up to speed, the divers toiled from the *Carolyn*

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[25] *Reporter's Transcript ("R.T.") 258-259*, at App. 13-15.

[26] *R.T. 410*, at App. 23-24.

[27] *R.T. 410-411*, at App. 23-25.

[28] *R.T. 334-335*, at App. 19-21.

[29] *R.T. 108-109*, at App. 2-5.

[30] *R.T. 108-109, 265-266, 849*, at App. 2-5, 16-18, 32-33.

[31] *R.T. 265*, at App. 16-17.

[32] *R.T. 118-119, 883-895*, at App. 5-7, 35-51, 58.

[33] *R.T. 33, 265*, at App. 1-2, 16-17.

and her consorts twelve-hours-a-day, five-and six-days-a-week.[34] Hoeflich had even planned to eat, sleep, and live aboard ship.[35] Had he not been injured, he would've continued diving with the Point Loma construction fleet until Martech's work was done. Indeed, even after the accident, Martech assured its general contractor that Hoeflich would be back on the project just as soon as his wounds had healed.[36] But they never did.

As things turned out, Hoeflich was permanently disabled on the first day of diving when he struck himself in the left foot with the laser-sharp jet of a sawed-off waterblaster while working inside the sewer, with no training, visibility or metatarsal guards, 210 feet below the surface of the Pacific. The pulsing waterblaster blew a hole through the top of his foot and injected raw feces into the wound.[37] After Martech finally got him to the surface, Hoeflich was hospitalized for 6 weeks, endured 13 surgeries, suffered fulminating infections, and nearly lost his foot.[38]

We filed his inevitable Jones Act claims in San Francisco Superior Court on March 31, 1993. Though Martech had theretofore paid all his medical expenses, together with a few months' wages, it terminated those benefits

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[34] *R.T. 224-226, 849-851,* at App. 8-11, 32-35.

[35] *R.T. 242-243, 264, 904,* at App. 11-13, 15-16, 51-52.

[36] *R.T. 108-110, 409-410,* at App. 2-5, 22-24.

[37] *Plaintiff's Trial Exhibit ("PX") 32, p. 1. R.T. 300, 433-434, 592,* at App. 18-19, 26-30, 59.

[38] *R.T. 592-93, PX 30,* at App. 29-31, 69-75.

when we served the complaint. We therefore filed a parallel LHWCA claim, on August 24, 1993, in an attempt to rekindle those interim payments.[39] But we abandoned that attempt after Martech's workers' compensation insurer controverted our LHWCA claim on grounds that Hoeflich was a seaman[40] and admonished us to "fi[le] for benefits under the Jones Act."[41]

The Jones Act case was eventually called to trial on December 8, 1994. At the close of the evidence the trial judge denied a defense motion for a directed verdict because, as he put it: "I think you have a fair jury issue on Jones Act seaman status."[42] The jury considered that issue and returned their verdict on January 5, 1995. Among other things, they specifically found that Hoeflich "was a Jones Act seaman" by a vote of 12 to 0, and awarded him $1,315,458 in damages.[43] But on February 28, 1995, the trial court granted Martech a judgment notwithstanding the verdict because the *Arctic Carolyn* had dropped anchor shortly before the accident and was therefore "out of navigation". Reasoned the jnov:

> "If plaintiff had been injured while helping the tug to move to its destination or to anchor there, Jones Act status would have been evident even though plaintiff was a diver rather than a member of the ship's company. But the tug was out of navigation before the plaintiff arrived, and he

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[39] August 24, 1993 LS-203, at App. 76-80.

[40] November 15, 1993 LS-18, at App. 81-83.

[41] September 28, 1993 LS-207, at App. 84-86.

[42] *R.T. 1175*, at App. 56-57.

[43] *Petitioner's Appendix, pp. 21a-24a.*

> did not further the tug's mission of providing a dive platform."[44]

But as this Court explained in *Chandris, Inc. v. Latsis*, " 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.' "[45] Relying on that decision, the California Court of Appeal therefore reversed the jnov in an unpublished opinion dated July 23, 1996. As the Court of Appeal summed up:

> "*Chandris* announced a two-pronged test for determination of seaman status under the Jones Act: (1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission; and (2) the employee must have a connection to a vessel in navigation or to an identifiable group of such vessels, that is substantial in terms of both its duration and its nature. *Chandris* emphasized that the purpose of the second requirement was to "[S]eparate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to perils of the sea." [citations omitted][46]

Noting that the "*Arctic Carolyn's* mission was to support divers performing work on the underwater sewer outfall, and [that] plaintiff's work as a diver was essential

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[44] *Petitioner's Appendix, pp. 16a-17a.*

[45] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2192.

[46] *Petitioner's Appendix, p. 6a.*

to that mission",[47] the Court of Appeal concluded that "[t]he dispositive inquiry here is whether plaintiff meets the second *Chandris* prong, i.e., whether his connection to the vessel from which he was diving at the time of his injury was sufficiently substantial in terms of both its duration and nature to afford him Jones Act protection."[48] It answered that inquiry affirmatively. To quote the opinion once again:

> "There was evidence here that plaintiff had a connection substantial in duration and nature to the *Arctic Carolyn* and other identifiable vessels in navigation. His assignment to the San Diego sewer project was expected to last approximately one year, with dives from the *Arctic Carolyn* and two seagoing barges."[49]

Though the parties have freighted their briefs with bulging appendices, we respectfully submit that this Court need look no further than that key excerpt to deny Martech's petition.

REASONS FOR DENYING THE WRIT

I.

THE STATE COURT'S DECISION WAS IN COMPLETE ACCORD WITH *CHANDRIS, INC. V. LATSIS.*

Martech is mistaken when it suggests that the decision below conflicts with *Chandris, Inc. v. Latsis*. As we

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[47] *Id.*

[48] *Id.*

[49] *Id.*, p. 7a.

saw, our state court of appeal relied on that opinion to the letter. It is therefore important to remember that the "second *Chandris* prong" is "not merely a temporal concept".[50] Quoting the oft' cited deep sea diving case of *Wallace v. Oceaneering Intn'l.*,[51] *Chandris* emphasized that, " 'the total circumstances of an individual's employment must be weighted to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.' "[52] It's impossible to imagine a sea-based maritime employee whose work exposes him more intimately or regularly to those perils than Gilson Hoeflich's. As *Wallace* put it, "A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land."[53] While *Wilander* told us that this fact was not necessarily determinative,[54] *Chandris* explained that we could nonetheless "weight" it when considering "the total circumstances" of the plaintiff's employment.[55] Given the "total circumstances" of this case, we took the position that our particular Jones Act seaman's status "sinks or swims with [his] assignment at the time of the accident."[56] *Chandris* supports that position.

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[50] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2191.

[51] 727 F.2d 427, 432 (5th Cir. 1984).

[52] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2190.

[53] *Wallace v. Oceaneering Intn'l, Inc., supra,* 727 F.2d at 436 [original emphasis].

[54] *McDermott Intn'l., Inc. v. Wilander,* 498 U.S. at 354.

[55] *Chandris, supra.*

[56] *R.T. 934-935,* at App. 52-55.

"In defining the prerequisites for Jones Act coverage", *Chandris* "eschew[ed] the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves."[57] While it agreed that "a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman", it stressed that "[t]his figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases."[58] To repeat a key passage from this Court's opinion in *Chandris*:

> "[W]e see no reason to limit the seaman status inquiry, as petitioners contend, to an examination of the overall course of a worker's service with a particular employer. When a maritime worker's basic assignment changes, his seaman status may change as well."[59]

Putting aside the desultory issue of whether respondent Hoeflich spent more than 30 percent of his overall employment with Martech in the service of a vessel (and there was abundant evidence to show that he did), we proved, the jury found, and the appellate court affirmed that his basic assignment changed from project to project. Sometimes he worked as a supervisor or a tender, and other times he worked as a diver. Sometimes he worked on a fixed oil platform, and other times he dove from a vessel. Sometimes he dove in rivers and lakes, but most

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[57] *Chandris, supra.*

[58] *Id.* at 2191.

[59] *Id.*

times he dove in the open ocean.[60] It is undisputed that, at the time of his accident, Hoeflich was diving in the Pacific Ocean, more than 2.5 miles off Point Loma, from a vessel in navigation. As both the jury and the appellate court recognized, his reassignment to the Point Loma project was slated to last for more than a year and involved a regular and continuous commitment of his time and toil to the mission of the construction fleet assembled there. It also involved an intimate and near-fatal exposure to the peculiar perils of a polluted sea. As *Chandris* summed up:

> "Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position."[61]

The decision below is naught but an unpublished application of that principle.

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[60] *Petitioner's Appendix, pp. 25a-26a.*

[61] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2191-2192.

II.

THE STATE COURT'S DECISION DID NOT CONFLICT WITH *DESPER V. STARVED ROCK FERRY COMPANY* OR ANY OTHER FEDERAL DECISION.

Turning its back on the dispositive passages from *Chandris*, and dredging up something it christened "the 'expectant seaman' doctrine", Martech next suggests that the decision below conflicts with this Court's opinion in *Desper v. Starved Rock Ferry Co.*, and with the circuit court opinions in *Heise v. Fishing Co. of Alaska* and *Antus v. Interocean SS Co.* But not one of those cases concerned a "seaman-in-being" who was injured aboard an operating vessel in the early stages of a long seagoing assignment. To the contrary, they each involved a once and future seaman who was hurt while engaged as a "seasonal repair worker"[62] aboard a dead vessel that had been withdrawn from navigation.

Thomas Desper was killed in a machine shop while painting life preservers from a small fleet of sightseeing boats that had been hauled out of the ice-bound Illinois River and placed on blocks for the winter.[63] John Heise was injured alongside a pier repairing the main engines and cracked fuel tank of a fishing vessel that had "completed its work for the fishing season and put in at Seward, Alaska for repairs and annual maintenance."[64] Mr. Antus was injured in the backwaters of Lorian, Ohio cleaning the bilges of a Great Lakes steamer that had

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[62] *Desper, supra*, 342 U.S. at 191.

[63] *Id.* at 188-189.

[64] *Heise v. Fishing Co. of Alaska, Inc., supra*, 79 F.3d at 904.

been "withdrawn from navigation" for the winter.[65] Unlike respondent Hoeflich, who was maimed 210 feet beneath the open ocean while diving from a voyaging tugboat during a year-long assignment to a seagoing construction fleet, these men came to grief on a dead vessel in a dockyard during a shore-based interlude. They only "hoped [they] would be able to stay with the ship when she sailed."[66] Martech's other citations are equally inapposite.[67]

We don't quarrel with the notion that "the law does not cover probable or expectant seamen but seamen in being."[68] This is just another way of stating the obvious principle that "[w]hen a maritime worker's basic assignment changes, his seaman status may change as well."[69] The plaintiffs in *Desper*, *Antus* and *Heise* were injured during a seasonal assignment as shore-based repair workers. Respondent Hoeflich was maimed during a year-long assignment as a seaman in being. As we said at the outset, this case is simply not "cert-worthy". Our state court's decision was on all fours with the maritime law.

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[65] *Antus v. Interocean SS Co., supra*, 108 F.2d at 186.

[66] *Heise, supra*, 79 F.3d at 905.

[67] *Baker v. Pacific Far East Lines*, 451 F.Supp. 84 (N.D. Cal. 1978) [plaintiff injured while working as a member of a "shoreside maintenance gang" upon a barge tied up for repairs]; *Sullivan v. American President Lines, Ltd.*, 206 F.Supp. 547 (N.D.Ca. 1961) [plaintiff injured while working "on dry land" as a member of a shoreside "maintenance gang" upon a life boat "up on chocks at Pier 50, San Francisco"].

[68] *Desper, supra*, 342 U.S. at 191.

[69] *Chandris, supra*, ___ U.S. at ___, 115 S.Ct. at 2191.

III.

THE STATE'S COURT DECISION WAS NOWISE RELATED TO *HARBOR TUG & BARGE CO. V. PAPAI.*

In a final effort to catch the Court's attention, Martech contends that the opinion below decided a question that is "related" in form to the ones posed by *Harbor Tug & Barge Co. v. Papai*. But this lure contains no hook.

Papai was argued last January 13th. Unlike this one, that case sat squarely astride the "zone of uncertainty" that connects the Jones Act with the LHWCA.[70] Ever since its decision in *Southwest Marine, Inc. v. Gizoni*,[71] this Court has recognized that there is an overlap between those two statutes. It granted certiorari in *Papai* to clarify the collateral consequences of that overlap.

While the statutes are mutually exclusive, it is "'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act".[72] The issue in *Papai* was whether an employee who'd been formally adjudged a longshore harbor worker and not a seaman, following a full administrative hearing, should be collaterally estopped from proving otherwise in a subsequent Jones Act case. But there is no such issue here. Respondent Hoeflich never even received voluntary LHWCA payments, much less a fully adjudicated award. The San Francisco Superior Court was the first and only tribunal to consider his case.

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[70] *Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983).

[71] 502 U.S. 81 (1991).

[72] *Gizoni, supra*, 502 U.S. at 91.

The vexing questions of mutual exclusivity, issue preclusion, and collateral estoppel, that distinguished *Papai*, never surfaced here. Neither did the issue of "casual" or "common employer" seaman status.[73]

Noting that John Papai belonged to the Inland Boatman's Union, and that the IBU typically assigned its members to different employers "on a day-to-day basis",[74] the Ninth Circuit held that: "If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system."[75] *If* it concludes that he can still prosecute a Jones Act case after winning a formal LHWCA award, this Court may consider whether John Papai can support his claim to seaman status with the vessel assignments he received from other employers. But that does not mean it should defer denying Martech's petition for certiorari in this case.

Our state court did not apply, quote, or even cite the Ninth Circuit's *Papai* opinion,[76] and we didn't prove, argue or allege that Hoeflich's Jones Act status should be gleaned from his service for anyone but Martech. Remembering that his basic assignment changed from project to project, we've always insisted that his standing

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[73] *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995).

[74] *Id.* at 204.

[75] *Id.* at 206.

[76] *Petitioner's Appendix, pp. 1a-9a.*

as a seaman should "sink or swim" with his year-long assignment off Point Loma. The jury agreed. Whatever Martech might suggest, the California Court of Appeal did not decide a question that related in any way to the peculiar issues posed in *Papai* when it ultimately affirmed that jury. It merely followed this Court's holding in *Chandris*. There is nothing "cert-worthy" about the opinion below.

CONCLUSION

Chandris tells us that if a maritime worker is "reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel", he or she is a Jones Act seaman.[77] Deep sea diving is a classic seaman's job.[78] What is more, our particular deep sea diver's reassignment to the Point Loma construction fleet comprised a regular and continuous commitment to the *Arctic Carolyn* and her consorts. Unlike Thomas Desper or John Heise, and just like Antonios Latsis, the plaintiff in *Chandris*, Gilson Hoeflich was injured at sea during a long assignment to a voyaging vessel. Unlike John Papai, he has never been accorded the benefit of interim LHWCA compensation. In fact, despite the gravity of his wounds, the permanency of his disability, and

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[77] *Chandris, supra,* ___ U.S. at ___, 115 S.Ct. at 2191-2192.

[78] *Wallace v. Oceaneering Intn'l,* Inc., *supra. See also, The Highlander,* 12 Fed.Cas. 136 (D. 1859) [salvage diver held seaman]; *The Murphy Tugs,* 28 F. 429 (E.D. Mich., 1886) [salvage diver held seaman].

the findings of a unanimous jury, Martech flatly refuses even to provide for his injured foot's ongoing medical needs pending the outcome of this appeal. When we wrote Martech's Jones Act carrier, London Underwriters, to request orthotic care for that still "deteriorating" foot[79] in the wake of our verdict, they declined on grounds that "Mr. Hoeflich is not a Jones Act seaman" and referred us to "CIGNA, Martech's L&H carrier."[80] But when we turned around and petitioned CIGNA for interim assistance, they wrote back that Mr. Hoeflich was a Jones Act seaman and therefore "not eligible for benefits under the LHWCA."[81] As should be painfully apparent, the Respondent won't be able to escape this frustrating trap until we're finally able to enforce his judgment.

WHEREFORE we respectfully urge this Court to deny Martech's Petition for Writ of Certiorari.

Dated: February 13, 1997

Respectfully submitted,

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[79] March 29, 1996 Declaration of Victor Taconelli M.D., at App. 87-88.

[80] October 13, 1995 Letter from George J. Koelzer, at App. 89-90.

[81] April 1, 1996 Letter from Roger Levy, at App. 91-93.

APPENDIX TO HOEFLICH BRIEF IN OPPOSITION

REPORTER'S TRANSCRIPT OF PROCEEDINGS

[1] VOLUME I

December 12, 1994

* * *

[33] PROGRAM FOR SAN DIEGO, AND ALSO SOUTHERN CALIFORNIA IN ITS ENTIRETY, WAS IMPROVING AND EXPANDING THEIR SEWERAGE SYSTEMS. SO THE INTENT WAS THAT THE POINT LOMA EXTENSION WOULD BE THE FIRST OF HOPEFULLY MANY PROJECTS THAT WE BID TOGETHER.

Q. WE AGAIN IS MORRISON-KNUDSEN AND MANSON?

A. CORRECT.

Q. JUST SO THE JURY IS CLEAR, M.K., OR MORRISON-KNUDSEN, HELD 60 PERCENT AND MANSON 40 PERCENT OF THE OWNERSHIP?

A. CORRECT.

Q. MR. STEARNS, APART FROM THE REPAIR PROJECT AND THE ULTIMATE OUTFALL EXTENSION PROJECT, HAS THE P.L.C. JOINT VENTURE PERFORMED ANY OTHER WORK TO DATE?

A. NOT P.L.C.

Q. WHEN WAS THE POINT LOMA OUTFALL EXTENSION PROJECT COMPLETED?

A. THE OFFICIAL COMPLETION DATE WAS NOVEMBER 24, 1993.

Q. AND AS THE FILM INDICATED, THAT PROJECT TOOK PLACE ESSENTIALLY IN THE WATERS WEST OF POINT LOMA?

A. YES.

Q. DURING MY OPENING STATEMENT, I INDICATED THAT THE ORIGINAL SEWERAGE OUTFALL WAS LAID SOMETIME IN THE SIXTIES. IS THAT RIGHT?

A. '63, YES.

* * *

[108] WAS BEFORE. IT WAS TWO YEARS AGO. MY RECOLLECTION ISN'T THAT GOOD.

Q. ALL RIGHT.

LET'S TURN OUR ATTENTION TO ANOTHER TOPIC, MR. HANSON.

AS MARC STEARNS' ASSISTANT DURING THE EARLY PHASE OF THE PROJECT, DID YOU EVER RECEIVE CONTRACT DOCUMENTATION FROM MARTECH?

A. THE CONTRACT? NOT DIRECTED TO ME, NO. WE HAD A ROUTING PROGRAM WITHIN THE OFFICE THAT THINGS WOULD BE ROUTED TO, AND ANYTHING DIVING WOULD BE COPIED TO ME. BUT I WASN'T IN DIRECT CONTRACT NEGOTIATIONS.

Q. I UNDERSTAND. MY QUESTION: YOU WERE AWARE, WERE YOU NOT, THAT MARTECH WAS OBLIGED TO PROVIDE CERTAIN INFORMATION TO P.L.C. UNDER THE CONTRACT, SAFETY PROGRAMS, DIVING MANUALS, KEY PERSONNEL LISTS?

A. YES, I WAS AWARE OF THOSE THINGS.

Q. INDEED, DID YOU RECEIVE A WRITTEN KEY PERSONNEL LIST FROM MARTECH PRIOR TO THE ONSET OF DIVE OPERATIONS?

A. YES.

Q. IT WAS MARTECH'S OBLIGATION UNDER THE CONTRACT TO FURNISH YOU WITH A CURRENT LISTING OF KEY PERSONNEL, WAS IT NOT?

A. I BELIEVE IT WAS.

Q. MR. HANSON, WAS GIL HOEFLICH ON THE LIST [109] YOU RECEIVED PRIOR TO THE ONSET OF DIVE OPERATIONS?

A. YES. WE FAXED THEM A LIST OF DIVERS WHO THEY WERE GOING TO HAVE, AND WHO WE WOULD LIKE TO SEE, ON THE DIVING OPERATION. AND WE RECONCILED THAT WITH WHICH DIVERS WOULD BE – THERE WERE SOME WE WANTED THAT THEY DIDN'T WANT IN. WE TOOK THEM OUT.

Q. AT ALL TIMES MR. HOEFLICH WAS ON THE LIST?

A. YES.

Q. THERE WAS A SUGGESTION MR. HOEFLICH MIGHT NOT HAVE STAYED ON THIS PROJECT VERY LONG. AFTER GIL'S ACCIDENT DID YOU CONTINUE TO RECEIVE KEY PERSONNEL LISTS FROM MARTECH?

A. I THINK WHEN WE WOULD GO INTO A NEW PHASE. THERE WASN'T TOO MANY DIFFERENT PHASES WE WENT INTO. BUT, YES, WHEN WE WOULD GO INTO A DIFFERENT PHASE OF OPERATION, THEY WOULD TELL US WHO THEY WOULD WANT, AND WE WOULD ALWAYS SAY WHO WE WOULD LIKE TO SEE ON THAT, AND IT WOULD BE RECONCILED.

Q. THAT IS AN AFFIRMATIVE, YES, YOU RECEIVED SUCH LISTS AFTER THE INJURY?

A. YES.

Q. MR. HANSON, EVEN AFTER HIS INJURY DID GIL HOEFLICH'S NAME CONTINUE TO APPEAR ON THE KEY PERSONNEL LIST THAT MARTECH FAXED YOU?

A. I CAN'T TELL YOU ONE WAY OR THE OTHER FOR SURE ON THAT.

Q. LET ME TURN YOUR ATTENTION TO THE DEPOSITION, THE ONE TAKEN OCTOBER 20, 1993. I WILL [110] SPECIFICALLY ASK YOU TO TAKE A LOOK AT TESTIMONY WHICH IS TRANSCRIBED ON PAGE 26 LINE 1 THROUGH LINE 10.

QUESTION: AFTER GIL'S INJURY, I TAKE IT THAT HE NO LONGER SHOWED UP UP ON THE KEY PERSONAL [sic] LISTS THAT WERE SUBMITTED AFTER THAT.

ANSWER: HE WAS LISTED AS A POSSIBLE – IF – DEPENDING HOW HIS TREATMENT WENT, AS A POSSIBLE, I BELIEVE, ONE ATMOSPHERE OPERATOR, IF HE WAS OKAY.

SO MARTECH CONTINUED TO LIST MR. HOEFLICH ON THE KEY PERSONNEL LIST AFTER HE WAS INJURED IN HOPES HE WOULD RECOVER?

A. IF I SAID THAT BACK THEN, MAYBE – I WAS CLOSER TO THE DATE. BUT AS A SUB OPERATOR, IT WAS HIS SPECIALTY.

Q. "ONE ATMOSPHERE OPERATOR" WAS THE TERM YOU USED?

A. ONE ATMOSPHERE IS A SUBMARINE.

Q. ONE ATMOSPHERE IS ALSO A BELL, IS IT NOT?

A. YES, IT IS.

Q. MR. KOELZER SUGGESTED THAT THE ONLY WORK AVAILABLE FOR DIVERS ON THIS PROJECT WHO WEREN'T DIVING WAS PILEBUTT WORK.

MR. KOELZER: OBJECTION.

THE COURT: OVERRULED.

MR. HILLSMAN: Q. WAS THERE A BELL USED IN CONNECTION WITH THIS PROJECT?

* * *

[118] A. YES.

Q. YOURSELF?

A. YES.

Q. LEN WELLS AND RICK THIELMANN.

A. YES. THEY – I THINK RICK WORKED.

Q. ALL OF THE DIVERS BUT GIL HOEFLICH?

A. YES.

Q. THE BETTY L WAS OWNED BY WHOM, SIR?

A. I BELIEVE MORRISON-KNUDSEN.

Q. APART FROM THE ARCTIC CAROLYN, THE HAAKON, AND THE BETTY L, WERE DIVING OPERATIONS CONDUCTED ON A CONTINUOUS BASIS AT P.L.C. ABOARD ANY OTHER VESSELS?

A. DIVE OPERATIONS – ANY OTHER VESSEL DURING THE EXTENSION PROJECT?

Q. CORRECT.

A. MAYBE OFF A TUG BOAT ON A COUPLE OF OCCASIONS. PRIMARILY EVERYTHING WAS RUN OFF THE BETTY L OR THE HAAKON.

Q. THE TUG WOULD HAVE HAD SCUBA OPERATIONS?

A. ANYTHING. IT WOULD HAVE BEEN AN INSHORE OPERATION.

Q. SURFACE-SUPPLY MIXED GAS DIVE OPERATIONS WERE CONDUCTED PRIMARILY, IF NOT ENTIRELY, FROM THOSE THREE VESSELS?

A. YES.

Q. THE ARTIC [sic] CAROLYN WAS OWNED BY MARTECH?

A. BEST OF MY KNOWLEDGE.

[119] Q. THE HAAKON BY MANSON?

A. YES.

Q. THE BETTY L. BY M.K.?

A. YES.

Q. ALL THREE PEOPLE DIRECTLY INVOLVED IN THE POINT LOMA PROJECT.

A. YES.

Q. LET'S TURN ATTENTION AWAY FROM THE JONES ACT –

MR. KOELZER: OBJECTION. ASK IT BE STRICKEN.

THE COURT: SUSTAINED. STRICKEN.

MR. HILLSMAN: Q. LET'S TURN ATTENTION TO THE DAY OF THE ACCIDENT. WHERE WERE YOU WORKING THAT DAY, MR. HANSON, SEPTEMBER 9, 1992?

A. I WAS ON THE ARCTIC CAROLYN.

Q. WHERE DID YOU REPORT TO WORK THAT MORNING?

A. THE OFFICE ON NORTH HARBOR DRIVE OF POINT LOMA CONSTRUCTORS?

A. IS THAT IN SAN DIEGO.

Q. YES.

Q. DOWNTOWN?

A. ON THE HARBOR, NEAR DOWNTOWN.

Q. WHAT TIME DID YOU REPORT TO WORK THAT MORNING; DO YOU RECALL? BEST OF YOUR RECOLLECTION.

A. I WOULD GUESS SIX OR SEVEN.

Q. EARLY IN THE MORNING?

A. YES.

* * *

[167] VOLUME II

December 13, 1994

* * *

[224] ED THOMAS?

A. I DON'T KNOW FOR SURE AS FAR AS YEARS IN THE BUSINESS OR – I DON'T KNOW FOR SURE.

Q. WAS MR. HOEFLICH ONE OF THE MORE SENIOR MEMBERS WITH THE TEAM?

A. YES.

Q. YOU HAVE WORKED WITH GIL BEFORE; IS THAT CORRECT?

A. YES.

Q. WOULD YOU AGREE HE IS A VERY GOOD DIVER?

A. YES.

Q. WOULD YOU AGREE, IN YOUR EXPERIENCE, HE IS A VERY SAFE DIVER?

A. YES.

Q. WHEN DID YOU FIRST LEARN THAT YOU WERE GOING TO BE INVITED TO WORK ON THE POINT LOMA SEWER OUTFALL PROJECT?

A. WELL, ABOUT A WEEK BEFORE THE JOB, I THINK, WAS THE FIRST I HEARD IT WAS ACTUALLY GOING TO TAKE PLACE AND I WAS GOING.

Q. THAT WOULD HAVE BEEN ROUGHLY SOMETIME IN THE VERY EARLY PART OF SEPTEMBER 1992?

A. YES.

Q. WHO, AS YOU UNDERSTAND, HIRED YOU TO WORK ON THAT PROJECT?

A. TOM THOMAS GAVE ME A CALL.

Q. AFTER MR. HOEFLICH'S ACCIDENT, DID YOU HAVE OCCASION TO DIVE ON THE PROJECT?

[225] A. YES.

Q. AFTER MR. HOEFLICH'S ACCIDENT, DID YOU REMAIN ON THE PROJECT FOR ITS DURATION?

A. YES.

Q. ALL THE WAY THROUGH THE END OF OPERATIONS IN NOVEMBER OR DECEMBER OF '93?

A. YES.

Q. DID YOU CONTINUE TO WORK AS PART OF THE DIVE TEAM ABOARD THE HAAKON?

A. I WORKED ON THE HAAKON, YES.

Q. DID YOU WORK ON THE BETTY L., ON THE DIVE TEAM?

A. YES.

Q. DID YOU AND THE OTHER TEAM MEMBERS REPORT TO THE VESSELS DAY IN DAY OUT FOR AN EXTENDED PERIOD OF TIME?

A. YES.

Q. WHEN YOU WEREN'T ACTUALLY CONDUCTING DIVE OPERATIONS, WHAT DID YOU DO ABOARD THE VESSELS?

A. I WORKED AS R.O.V. SUPERVISOR ON THE HAAKON, AS A DIVING SUPERVISOR ON THE HAAKON.

ON THE BETTY L, I WORKED AS A STANDBY DIVER, DIVING SUPPORT FOR THE HORSE AND ONE ATMOSPHERE BELL. WORKED AS PIPE PREPARER, AS A PILEBUTT, RIGGING, WHATEVER WAS NEEDED.

Q. WHEN THERE WERE NO DIVE OPERATIONS UNDER WAY, YOUR EMPLOYERS FOUND DAY-TO-DAY JOBS FOR YOU THAT KEPT YOU WORKING ABOARD THOSE VESSELS DAY IN [226] AND DAY OUT FOR A LONG PERIOD OF TIME?

A. YES.

Q. ALL THE WAY THROUGH THE END OF THE PROJECT?

A. YES.

Q. WAS THAT ALSO TRUE OF MR. THIELST?

A. YES.

Q. IN FACT, IT WAS TRUE OF EVERYBODY ON THE DIVE TEAM BEFORE GIL HOEFLICH'S INJURY THE FIRST DAY OF THE PROJECT?

A. NO. SOME OF THE PEOPLE – WELL, YEAH, I GUESS SO.

Q. THE EXPERIENCED MARTECH HANDS, ED THOMAS, YOURSELF, MR. THIELST, MR. THIELMANN, ALL REMAINED ON THE PROJECT FOR THE DURATION?

A. THIELMANN WASN'T A MARTECH HAND EXCEPT FOR THE FIRST JOB.

Q. HE WAS THERE THROUGHOUT?

A. YES.

Q. NOW, MR. MITTRY, LET'S TURN YOUR ATTENTION TO THE DAY OF THE ACCIDENT.

AS THE RACK OPERATOR, YOU BASICALLY MONITORED THE BREATHING MIXTURE; CORRECT?

A. YES.

Q. DO YOU ALSO FILL OUT THE DIVE LOG?

A. YES.

Q. WOULD YOU TELL US WHAT THE DIVE LOG IS.

A. A SHEET OF PAPER YOU KEEP TRACK OF THE DIVER'S TIME, THE DECOMPRESSION CHAMBER TIME, AND

* * *

[242] HAD. BUT AFTER, I HAD SPOKEN TO OTHER GUYS. AND THE PARTICULAR JOB THAT I HAD TALKED ABOUT IN THE DEPOSITION WAS AFTER.

Q. AFTER THE ACCIDENT?

A. AFTER THE ACCIDENT.

MR. HILLSMAN: YOUR HONOR, JUST TO MAKE A RECORD, I REFER THE WITNESS TO PAGE 83 LINE 25 THROUGH 85 LINE 3 OF THE DEPOSITION.

MR. KOELZER: WE DO NOT HAVE TO TAKE UP THE TIME OF THE JURY –

MR. HILLSMAN: I WON'T TAKE UP MUCH OF IT.

THE COURT: GO AHEAD. IT SEEMS USELESS. YOU HAVE EXPLAINED THE RECOLLECTION. IF YOU WANT TO DO IT, GO AHEAD.

MR. HILLSMAN: IN THE INTEREST OF TIME, WITH THE COURT'S RECOMMENDATION, I WON'T BOTHER WITH IT THIS TIME.

Q. LET'S TURN OUR ATTENTION TO THE DAY OF THE ACCIDENT.

DID YOU RIDE DOWN TO THE DIVE SITE WITH MR. HOEFLICH ON THE MORNING OF THE ACCIDENT?

A. YES.

Q. HAD YOU AND HE COME PREPARED TO STAY ABOARD THE ARCTIC CAROLYN?

A. YES.

Q. YOU WERE TOLD THAT THE JOB WAS GOING TO LAST A PERIOD OF DAYS, WERE YOU NOT?

A. THREE OR FOUR DAYS.

[243] Q. DID YOU COME PREPARED TO ACTUALLY LIVE ABOARD THE CAROLYN DURING THOSE DAYS?

A. YES.

Q. HOW ABOUT MR. HOEFLICH, WAS IT HIS INTENTION TO LIVE ABOARD THOSE THREE OR FOUR DAYS?

A. I BELIEVE SO.

Q. SIR, I BELIEVE THE EVIDENCE WILL SHOW, OR HAS ALREADY SHOWN, YOU ATTENDED A DIVE BRIEFING EARLY IN THE MORNING ON SHORE WITH MR. HANSON.

A. YES.

Q. AND MR. HANSON SHOWED YOU THE VIDEOTAPE?

A. YES.

Q. FOLLOWING THE BRIEFING, YOU AND MR. HANSON AND THE RESET OF THE TEAM WENT OUT TO THE ARCTIC CAROLYN?

A. YES.

Q. ED THOMAS HAD NOT BEEN IN THAT BRIEFING?

A. NO, HE WASN'T.

Q. ONCE YOU GOT ABOARD THE CAROLYN –

I BELIEVE THE EVIDENCE WILL SHOW THAT OCCURRED AROUND 9:30 IN THE MORNING. DOES THAT SOUND RIGHT?

A. ABOUT.

Q. DIVE OPERATIONS DIDN'T BEGIN UNTIL APPROXIMATELY 1:00; IS THAT CORRECT?

A. SOUNDS ABOUT RIGHT.

Q. DID YOU HELP SET UP THE DIVE EQUIPMENT?

A. YES.

* * *

[258] MR. HILLSMAN: WHICH DIVE SCHOOL DID YOU ATTEND?

A. DIVERS TRAINING ACADEMY IN FORT PIERCE, FLORIDA.

Q. WHEN DID YOU ATTEND THERE?

A. I THINK I STARTED IN SEPTEMBER OF '77.

Q. WHEN DID YOU LEAVE THAT SCHOOL?

A. DECEMBER OF '77.

Q. DID YOU COMPLETE THE PROGRAM THERE?

A. YES.

Q. WHAT DID THE PROGRAM TRAIN YOU FOR, COULD YOU TELL US?

A. BASICALLY THEY GIVE YOU A DIPLOMA WHERE YOU CAN GO INTO THE INDUSTRY. THEY

GIVE YOU A LITTLE HANDS-ON FOR AIR DIVING, MIXED GAS. NOT REALLY INVOLVED; JUST ENOUGH TO GET YOU OUT THERE.

Q. AND DID YOU RECEIVE ANY WATERBLASTER TRAINING WHILE YOU WERE AT FORT PIERCE?

A. NO.

Q. DID YOU RECEIVE ANY TRAINING IN HAND-JETTING?

A. NO.

Q. IN YOUR EXPERIENCE, IS THE USE OF EQUIPMENT LIKE HAND-JETTING AND WATERBLASTERS GENERALLY TRAINING WHICH YOU ARE SUPPOSED TO ACQUIRE ON THE JOB?

A. YES.

Q. FOR WHOM DID YOU FIRST GO TO WORK IN THE [259] DIVE INDUSTRY?

A. MARTECH.

Q. AND DID YOU REMAIN STEADILY EMPLOYED WITH MARTECH THROUGHOUT YOUR EMPLOYMENT IN THE DIVE INDUSTRY, OR DID YOU WORK FOR OTHER EMPLOYERS?

A. IN THE GULF OF MEXICO, PRIMARILY MARTECH. WHEN I CAME OUT TO CALIFORNIA IT WAS, I'D HAVE TO SAY, AROUND 99 PERCENT MARTECH.

Q. WHEN DID YOU COME TO CALIFORNIA?

A. I BELIEVE THAT WAS IN '85. AROUND THERE.

Q. AND WHEN YOU WORKED FOR MARTECH, WHAT TYPES OF WORK DID YOU DO FOR THEM? WHAT WERE YOUR JOBS WITH MARTECH?

A. BOTH IN THE GULF AND IN CALIFORNIA?

Q. LET'S TALK ABOUT CALIFORNIA. FOR EXAMPLE, DID YOU EVER WORK IN THE SHOP?

A. YES. LOADING OUT JOBS, WORKING ON SOME OF THEIR EQUIPMENT.

Q. YOU WERE PRESENT WHEN JOHN SABO TESTIFIED?

A. YES.

Q. HE TOLD US THAT HE WORKED FOR MARTECH AS A DIVER/MECHANIC.

A. YES.

Q. YOU RECALL THAT HE INDICATED HE WORKED STEADILY FOR THE COMPANY IN THE SHOP BETWEEN DIVE JOBS. WAS THAT YOUR EXPERIENCE?

A. NO.

Q. DID YOU REMAIN STEADY FOR MARTECH ON A

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[264] OR TED ROCHE.

Q. AND WHAT DID THEY TELL YOU ABOUT THE FIRST PHASE OF THE POINT LOMA PROJECT?

A. THEY SAID WE WERE GOING TO GO OUT THERE AND GET SOME MEASUREMENTS ON THE END PIECE. THE ENGINEERS NEEDED IT, I GUESS, FOR THE COMING WORK.

Q. DID THEY TELL YOU HOW LONG THEY EXPECTED THAT PHASE OF THE WORK TO LAST?

A. I WAS TOLD AROUND FOUR DAYS.

Q. DID THEY TELL YOU WERE THEY WERE GOING TO BE PERFORMING THAT WORK, FROM WHICH VESSEL?

A. THE ARCTIC CAROLYN.

Q. HAD YOU WORKED ABOARD THE ARCTIC CAROLYN BEFORE?

A. YES.

Q. AND WAS IT YOUR INTENTION TO LIVE ABOARD THE ARCTIC CAROLYN DURING THE FOUR DAYS?

A. YES.

Q. IS THE ARCTIC CAROLYN EQUIPPED WITH GALLEY FACILITIES AND LIVING FACILITIES?

A. YES.

Q. DID YOU BRING DIVE GEAR WITH YOU WHEN YOU WENT TO SAN DIEGO TO LIVE ABOARD THE ARCTIC CAROLYN FOR THE FIRST PHASE?

A. YES. WHEN I GOT DOWN TO OXNARD, I WAS INTENDING TO RIDE IT DOWN, BUT JOHN SAID HE WAS GOING TO DRIVE.

Q. WHERE WAS SHE BIRTHED [sic] WHEN YOU HELPED [265] MOBILIZE HER?

A. PORT HUENEME.

Q. ON THE SANTA BARBARA CHANNEL, NORTH OF SAN DIEGO?

A. YES.

Q. HOW DID THE ARCTIC CAROLYN GET FROM PORT HUENEME TO SAN DIEGO?

A. THEY STEAMED.

Q. WAS IT YOUR INTENTION TO MAKE THAT TRIP ABOARD THE ARCTIC CAROLYN INITIALLY?

A. ORIGINALLY, YES.

Q. WHAT CHANGED THAT?

A. JOHN SAID HE WANTED HIS VEHICLE DOWN THERE. I OPTED TO RIDE WITH HIM.

Q. WHEN MR. THOMAS AND MR. ROCHE FIRST CONTACTED YOU ABOUT THE POINT LOMA PROJECT, DID THEY TELL YOU HOW LONG THE OVERALL JOB WAS PLANNED TO LAST?

A. TOTAL JOB?

Q. TOTAL JOB.

A. OVER A YEAR.

Q. DID THEY TELL YOU HOW LONG THEY EXPECTED YOU TO WORK ON THE OVERALL JOB?

A. I EXPECTED TO BE ON IT THE LENGTH OF THE JOB.

MR. KOELZER: OBJECTION. THAT IS NOT THE QUESTION.

THE COURT: SUSTAINED.

[266] MR. HILLSMAN: Q. DID MR. THOMAS OR MR. ROCHE TELL YOU HOW LONG THEY EXPECTED YOU TO WORK ON THAT PROJECT?

A. I WOULD HAVE TO SAY YES, BECAUSE I EXPECTED TO BE ON IT.

Q. LET ME PUT IT TO YOU THIS WAY. WHEN YOU FIRST LEARNED THAT YOU WERE GOING TO BE WORKING ON THE POINT LOMA PROJECT AND YOU WERE AWARE IT WAS IN SAN DIEGO, –

A. YES?

Q. – YOU WERE TOLD IT WAS ABOUT A YEAR?

A. YES.

Q. DID YOU ASK MR. THOMAS OR MR. ROCHE WHETHER YOU SHOULD CONSIDER MOVING TO SAN DIEGO WITH YOUR WIFE?

A. YES. EARLIER, BEFORE, WHEN WE WERE TALKING ABOUT THE JOB, I ASKED TOM ABOUT IT. SUE AND I WERE DECIDING WHAT TO DO. IT WAS A LONG TIME TO BE AWAY FROM HOME. WE THOUGHT IT WOULD BE A GOOD IDEA TO RENT A PLACE. I THINK THAT WAS ONE OF THE REASONS I RODE WITH JOHN, TO GET A PAPER AND SEE WHAT WAS AVAILABLE AS FAR AS RENT. I MENTIONED IT TO TOM, IF HE PLANS ON HAVING ME ON THE JOB THE LENGTH OF IT, IF SUE AND I SHOULD MOVE. IN THE END, HE SAID PLAN ON IT.

Q. DID HE SAY IT WOULD BE A GOOD IDEA FOR YOU TO RENT SOMEPLACE IN SAN DIEGO?

A. YES.

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[300] Q. DID YOU CONSIDER WHETHER THIS WOUND MIGHT BE AN INJECTION WOUND?

A. WELL, I – YEAH, I PROBABLY THOUGHT IT WAS AN INJECTION WOUND BECAUSE OF THE NATURE OF THE TOOL.

Q. AS YOU USE THAT TERM, "INJECTION WOUND," WOULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT YOU HAVE IN MIND.

A. THAT WOULD BE AN INJURY CAUSED BY A DEVICE THAT HAD DEVELOPED A LOT OF PRESSURE AND THAT ACTUALLY CAUSED THE WOUND.

Q. LOOKING BACK IN YOUR OWN STATE OF MIND AT THE TIME WHEN YOU WERE CALLED UPON TO TREAT GIL, REALIZING IT WAS AN INJECTION WOUND, REALIZING HE WAS WORKING IN CONTAMINATED WATER, DID YOU CONSIDER THE WATERBLASTER MIGHT HAVE INJECTED SEWERAGE OR FECES OR CONTAMINANTS INTO THE FOOT ITSELF?

A. YES.

Q. NOW, GIL ARRIVED ON DECK INSIDE THE DIVE STAGE?

A. YEAH, I'M PRETTY SURE WE HAD A DIVE STAGE THERE.

Q. AGAIN REFERRING TO EXHIBIT 9, WE ARE TALKING ABOUT THE DIVE STAGE HERE?

A. THAT COULD BE IT.

Q. AFTER GIL CAME FROM THE DIVE STAGE, DID YOU HELP HIM INTO THE DECOMPRESSION CHAMBER?

A. YES.

Q. DID YOU JOIN MR. HOEFLICH INSIDE THE

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[334] A. YEAH, I HAD JUST PURCHASED MY SECOND URCHIN BOAT.

Q. HOW MUCH DID THAT COST?

A. TO SET IT ALL UP? OR THE BOAT ITSELF?

MR. KOELZER: OBJECTION; NO RELEVANCY.

THE COURT: SUSTAINED.

MR. HILLSMAN: I AM OFFERING TO PROVE THIS WAS A MAN WHO HAD SPENT A GOOD DEAL OF MONEY AND HAD EVERY INTENTION OF STAYING IN THE DIVE BUSINESS.

THE COURT: THAT HAS NOTHING TO DO WITH THIS.

MR. HILLSMAN: THIS REQUIRED A GOOD DEAL OF MONEY.

THE COURT: DIFFERENT LINE OF WORK.

MR. HILLSMAN: EXACTLY. HE CAN NO LONGER DO EITHER.

THE COURT: OBJECTION IS SUSTAINED.

MR. HILLSMAN: HAD YOU EVER WORKED IN THE SALVAGE DIVING BUSINESS AS OF THE DAY OF THE ACCIDENT?

A. YES.

Q. WHEN HAD YOU LAST WORKED IN THE SALVAGE DIVING BUSINESS?

A. IT WAS A JOB IN BARCELONA JUST BEFORE THE WEDDING, PROBABLY ABOUT THREE OR FOUR MONTHS BEFORE THE ACCIDENT.

Q. FOR WHOM HAD YOU WORKED ON THAT JOB?

A. IT WAS A GENTLEMAN UP IN VANCOUVER, WASH – [335] CANADA, WILLIAM BOWMAN.

Q. HOW LONG WERE YOU ENGAGED IN THAT PROJECT IN BARCELONA ?

A. I THINK ABOUT A MONTH-AND-A-HALF. I HAD TO CUT IT SHORT AND GET BACK TO THE WEDDING.

Q. THIS WASN'T FOR MARTECH, I GATHER.

A. NO, IT WASN'T.

Q. HAD YOU NOT BEEN INJURED, HAD YOU HOPED TO CONTINUE WORKING IN MR. BOWMAN'S BUSINESS?

A. OH, YES.

Q. WHY IS THAT?

A. PRETTY LUCRATIVE. A LOT OF FUN, TOO. IT IS REALLY GOOD EXPERIENCE.

Q. AND DID THE WORK YOU DID FOR MR. BOWMAN INVOLVE DIVING?

A. YES.

Q. HAD YOU EXPECTED TO CONTINUE TO DIVE FOR MR. BOWMAN BUT FOR YOUR INJURY?

A. YES.

THE COURT: MR. HILLSMAN, I AM GOING TO INVITE A FURTHER OFFER FROM YOU AS TO THE URCHIN BUSINESS. HE IS NOT BEING HIRED TO DO THAT, BUT DOING IT FOR HIS OWN ACCOUNT. DOES IT INVOLVE, NECESSARILY, DIVING BY HIM?

MR. HILLSMAN: OH, YES, SIR.

THE COURT: I WILL PERMIT TESTIMONY ALONG THOSE LINES.

MR. HILLSMAN: Q. LET'S RETURN TO THE

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[398] VOLUME III

December 14, 1994

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[409] Q. WERE YOU AND MR. THOMAS THE ONES WHO CHOSE GIL FOR THE PROJECT?

A. YES.

Q. FOR HOW LONG HAD YOU KNOWN GIL HOEFLICH?

A. PROBABLY MID-EIGHTIES.

Q. YOU AND HE HAD WORKED TOGETHER AT MARTECH?

A. YES.

Q. WORKED OFFSHORE TOGETHER?

A. YES.

Q. HAD HE WORKED UNDER YOUR SUPERVISION?

A. AT TIMES.

Q. DID YOU EVER WORK UNDER HIS?

A. MAYBE AS AN EQUAL, BOTH DIVERS.

Q. WOULD YOU AGREE THAT GIL HOEFLICH WAS ONE OF YOUR TOP DIVERS IN SEPTEMBER OF '92?

A. THAT IS CORRECT.

Q. WAS HE ONE OF THE MOST SENIOR MEMBERS?

A. ON THAT DIVE TEAM? AS FAR AS LENGTH OF SERVICE TO MARTECH? OR IN THE FIELD?

Q. SENIORITY IN TERMS OF SERVICE TO MARTECH.

A. CORRECT.

Q. WOULD YOU AGREE THAT YOU THOUGHT GIL WAS A VERY CAPABLE HAND?

A. YES.

Q. WOULD YOU AGREE THAT YOU THOUGHT GIL WAS A SAFE DIVER?

A. THAT IS CORRECT.

Q. IN THE PAST YOU HAD PERSONALLY NAMED HIM [410] DIVING SUPERVISOR ON MARTECH JOBS ON PROBABLY MORE THAN 20 OCCASIONS, HAD YOU NOT?

A. CLOSE TO THAT.

Q. A DIVING SUPERVISOR IS THE MOST RESPONSIBLE POSITION ON ANY DIVE TEAM?

A. UNLESS THERE IS A TWO-SHIFT OPERATION, WHERE THE SUPERINTENDENT WOULD SUPERCEDE HIM.

Q. ON MOST OF THE JOBS YOU SENT GIL ON, IT WAS A ONE-MAN OPERATION WHERE HE WAS ESSENTIALLY IN CHARGE?

A. TO THE BEST OF MY RECOLLECTION.

Q. WAS HE REPUTED TO MANSON AS ONE OF YOUR TOP DIVERS; DO YOU RECALL MAKING THAT STATEMENT?

A. I BELIEVE SO.

Q. NOW, LET'S TALK A MINUTE ON HOW MARTECH HIRED ITS DIVERS.

AS GENERAL EMPLOYER FOR THE COMPANY, YOU WERE A PERMANENT EMPLOYEE, WERE YOU NOT?

A. THAT IS CORRECT.

Q. YOU STAYED ON, PROJECT IN PROJECT OUT?

A. THAT IS CORRECT.

Q. WAS THAT ALSO TRUE OF YOUR DIVERS?

A. WE HAD – THE DIVERS WERE PAID -- NONE WERE IN SALARIED A POSITION. THEY WERE PAID THE DAYS AND HOURS THEY WORKED.

Q. BASICALLY, THE DIVERS WERE HIRED ON A PROJECT-BY-PROJECT BASIS; ISN'T THAT CORRECT?

A. YES.

[411] Q. SOME DIVERS LIKE GIL WERE HIRED AGAIN AND AGAIN, PROJECT AFTER PROJECT?

A. DEPENDING ON HIS AVAILABILITY, CORRECT.

Q. BETWEEN PROJECTS YOU DIDN'T EXPECT GIL TO STAND BY AND HOLD HIMSELF AVAILABLE FOR YOU; IF HE HAD AN OPPORTUNITY ELSEWHERE, HE COULD TAKE IT?

A. HE DID.

Q. THAT'S WHAT YOU MEANT WHEN YOU SAID DEPENDING ON AVAILABILITY?

A. THAT IS CORRECT.

Q. LET'S SHIFT AND TALK ABOUT PRE-JOB PLANNING ON THE PROJECT.

YOU ARE FAMILIAR, ARE YOU NOT, WITH THE MARTECH CORPORATE SAFETY PROGRAM?

A. YES, SIR.

Q. YOU ARE AWARE THAT THAT REQUIRES MARTECH TO APPOINT A PROJECT SAFETY COMMITTEE?

A. COMMITTEE? OR OFFICER?

Q. SAFETY COMMITTEE.

A. NO, I DON'T REMEMBER THAT.

Q. LET'S SEE IF I CAN REFRESH YOUR RECOLLECTION.

I SHOW YOU PAGE 22 FROM THE MARTECH CORPORATION SAFETY PLAN, EXHIBIT 7. IT SPEAKS OF A PROJECT SAFETY COMMITTEE.

DO YOU RECALL NOW THAT THE SAFETY PLAN REQUIRED A PROJECT SAFETY COMMITTEE APPOINTED?

A. YES.

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[433] Q. WOULD YOU TELL THE LADIES AND GENTLEMEN OF THE JURY WHAT HE TOLD YOU AT THAT TIME.

A. GIL WAS EXTREMELY CONCERNED BECAUSE THE INJURY WAS MORE SEVERE THAN WE HAD ANTICIPATED BECAUSE OF THE POTENTIAL INFECTION AND THAT THEY WERE TALKING ABOUT POTENTIALLY HAVING TO DO SERIOUS THINGS TO HIS FOOT.

Q. INDEED, GIL TOLD YOU THEY WERE TALKING ABOUT AMPUTATING HIS FOOT?

A. CORRECT.

Q. DID YOU TALK TO DR. CHEW THE MORNING HOURS OF SEPTEMBER 10, 1992?

A. I WILL HAVE TO REFER TO THIS. I TALKED TO MANY DOCTORS.

Q. PAGE 3, THE ENTRY 9-10-92, A.M., WOULD YOU READ THAT ENTRY TO THE JURY, PLEASE.

A. (READING:) CALLED HOSPITAL, TALKED TO NURSE, DR. TODD LINCOLN WILL CALL ME BACK.

I GOT DR. CHEW'S NUMBER, 619 NUMBER.

I GOT NOTES: BLEW FECES INTO THE FOOT, DR. TODD LINCOLN, LOWER HALF OF THE FOOT SPLIT, ALL OF THE TENDONS AND MUSCLES, RAW FECES INJECTED INTO THE – INTO BLOOD STREAM, INTO TISSUE, AND AT THIS POINT IS INFECTED TO THE BONE.

Q. THE SAME MORNING AT ABOUT 1130 HOURS, DID YOU RECEIVE A REPORT FROM DR. LINAWEAVER?

A. YES.

Q. WHAT DID THE DOCTOR TELL YOU?

[434] A. (READING:) DR. LINAWEAVER HAD TALKED TO DR. NEUMAN, DISASTEROUS INJURY TO THE FOOT, INTO THE BASE OF THE FOOT, ORTHOPEDIC STAFF WORKING ON INJURY, CHANCES OF SAVING THE FOOT IS MIRACULOUS.

Q. NOW, AS MARTECH'S WEST COAST DIVISION GENERAL MANAGER, DID YOU INVESTIGATE THIS ACCIDENT ON BEHALF OF THE COMPANY?

A. YES.

Q. DID ANYONE ASSIST YOU IN THAT INVESTIGATION?

A. I WOULD HAVE BEEN ASSISTED BY TOM THOMAS.

Q. DID YOU EVER SPEAK TO THE WITNESSES?

A. YES.

Q. DID YOU SPEAK TO ED THOMAS?

A. YES.

Q. DID YOU LEARN WHAT GIL WAS DOING AT THE TIME OF THE ACCIDENT?

A. YES.

Q. DID YOU LEARN THAT HE WAS USING THE WATERBLASTER GUN WE HAVE MARKED AS EXHIBIT 18?

A. YES.

Q. DID YOU EXAMINE THE GUN YOURSELF?

A. YES.

Q. WHAT DID YOU LEARN ABOUT MR. HOEFLICH'S FOOTWEAR?

A. HIS FOOTWEAR?

Q. CORRECT.

A. HE WAS WEARING – I BELIEVE HE WAS WEARING

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[583] VOLUME IV

December 15, 1994

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[592] A. YES.

Q. THAT WAS A WEEK AFTER HIS INITIAL SURGERY?

A. YES, THEY WERE WORRIED ABOUT SEPSIS SETTING IN.

Q. WHEN DID MR. HOEFLICH TURN THE CORNER ON THE DANGER OF AMPUTATION, AS YOU RECALL?

A. PROBABLY TWO TO THREE WEEKS AFTER HIS INJURY, WHEN WE FELT IT WASN'T GOING TO BE IN DANGER.

Q. YOU SAID YOU AND THE STAFF WERE WORRIED HE WOULD BECOME SEPTIC. COULD YOU EXPLAIN.

A. BECAUSE OF THE INJURY HE SUSTAINED, HE – AND WHERE IT HAPPENED, WHERE HE WAS, RAW SEWERAGE, THE INJURY BLEW A HOLE RIGHT THROUGH HIS FOOT. AND IF IT WAS IN SEWERAGE, IT COULD GO INTO THE SYSTEM, MAKING IT – GETTING INFECTION THROUGHOUT HIS ENTIRE BODY.

Q. YOU WERE AWARE MR. HOEFLICH WAS RECEIVING MASSIVE DOSES OF ANTIBIOTICS?

A. YES.

Q. NOTWITHSTANDING HIS ANTIBIOTICS, THERE WAS ASTILL AN ONGOING CONCERN HE MIGHT BECOME SEPTIC?

A. YES.

Q. HOW LONG DID THAT CONCERN PERSIST?

A. AS I SAY, THREE WEEKS OR FOUR WEEKS AFTER INITIAL INSULT.

Q. HOW MANY DAYS A WEEK DO YOU TYPICALLY WORK AT THE HOSPITAL?

A. WE WORK USUALLY FIVE DAYS A WEEK. AND [593] SOMETIMES SATURDAY I COVER FOR HYDROTHERAPY.

Q. ORDINARILY DO YOU WORK SUNDAYS?

A. NO.

Q. DID YOU VIOLATE THAT FOR MR. HOEFLICH?

A. YES.

Q. WHY?

A. BECAUSE I WAS CONCERNED ABOUT HIS LOSING HIS FOOT, AND I DIDN'T WANT HIM TO LOSE IT.

Q. YOU SAY YOU GIVE PATIENTS WHIRLPOOL THERAPY. DID YOU DO THAT FOR GIL?

A. YES.

Q. HOW MANY TIMES A DAY?

A. TWICE A DAY.

Q. IS THAT A PAINFUL EXPERIENCE FOR A PERSON LIKE MR. HOEFLICH?

A. NOT NECESSARILY. USUALLY, WHEN WE HAVE HYDROTHERAPY PATIENTS, AS THE WOUND GETS BETTER, IT IS NOT AS PAINFUL. IN THIS CASE, IT WAS. HE – THE PAIN WAS JUST INCREDIBLE.

Q. LET'S TALK ABOUT THE WHIRLPOOL JUST A MINUTE. FIRST OF ALL, WHAT SOLUTION DO YOU BATHE THE FOOT IN? IS IT FRESH WATER? SALT WATER?

A. IT DEPENDS ON THE WOUND. IF IT IS INFECTED, WE LIKE TO START WITH BETADINE, WHICH IS AN ANTIBIOTIC, TO KIND OF KILL ORGANISMS GROWING. AS IT GETS BETTER, WE PUT IT IN DAKINS, DRUGS SO IT CAN GRANULATE. ONCE WE SEE VIABLE FLESH, WE PUT IT IN SALINE BECAUSE IT IS CLOSE TO THE SOLUTION THE BODY

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[724] VOLUME V

December 19, 1994

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[849] MR. THOMAS?

A. PROBABLY SINCE AROUND '77, '78.

Q. HAVE YOU HAD A CHANCE TO WORK WITH HIM OFFSHORE A GOOD DEAL?

A. A GOOD DEAL.

Q. WOULD YOU AGREE THAT IN YOUR OPINION GIL IS A VERY GOOD DIVER?

A. YEAH, GIL IS GOOD IN THE WATER.

Q. WOULD YOU AGREE HE ENJOYS A GOOD REPUTATION IN THE TRADE?

A. YES.

Q. WOULD YOU AGREE HE IS A SAFETY-CONSCIOUS DIVER?

A. I WOULD AGREE, YEAH.

Q. LOOKING BACK ON EVENTS, YOU HAD NO CRITICISMS WITH GIL HOEFLICH AT ALL, DID YOU?

A. NONE.

Q. IF GIL WOULD BE WILLING TO WORK DOING DIVING, WOULD YOU BE GLAD TO HAVE HIM ON A FIXED GAS DIVE TEAM?

A. YES.

Q. YOU REMAINED ON THIS PROJECT UNTIL THE END OF THE JOB?

A. YES.

Q. IN FACT, SO DID ALL OF THE OTHER DIVERS ON THE TEAM, MR. MITTRY, MR. HANSON, MR. WELLS, MR. THIELST, AND MR. THIELMANN?

A. YES.

[850] Q. DURING THAT PERIOD OF TIME, YOU AND THE OTHER DIVERS WORKED ON THE HAAKON INITIALLY?

A. INITIALLY.

Q. DO YOU RECALL WHAT PERIOD OF TIME YOU AND YOUR DIVE TEAM WORKED ON THE HAAKON?

A. LATER IN THE YEAR, I BELIEVE NOVEMBER, DECEMBER.

Q. HOW LONG DID YOU CONTINUE TO WORK ON THE HAAKON?

A. MYSELF, THAT WAS IT, NOVEMBER AND DECEMBER. IT WAS BEFORE THE END OF THE YEAR, I BELIEVE.

Q. DURING THE PERIOD YOU WORKED ON THE HAAKON, WERE YOU WORKING FIVE, SIX, SEVEN DAYS A WEEK?

A. SIX, AS I RECALL.

Q. HOW MANY HOURS A DAY?

A. TWELVE-HOUR SHIFTS.

Q. DAY AFTER DAY AFTER DAY; CORRECT, SIR?

A. I BELIEVE SO. SIX DAYS A WEEK.

Q. AFTER YOUR ASSIGNMENT TO THE HAAKON, YOU THEN JOINED THE BETTY L?

A. THAT IS CORRECT.

Q. AS DID MR. MITTRY, MR. HANSON, MR. WELLS, MR. THIELST, AND MR. THIELMANN?

MR. KOELZER: OBJECT TO THE FORM, YOUR HONOR. IT HAS A CERTAIN CONNOTATION WHICH IS INACCURATE AND INAPPROPRIATE.

THE COURT: OBJECTION IS OVERRULED.

MR. HILLSMAN: Q. AS DID MR. MITTRY, [851] MR. HANSON, MR. WELLS, MR. THIELST, MR. THIELMANN; CORRECT?

A. YES.

Q. AND YOU ALL REMAINED ON THE BETTY L FOR THE DURATION OF THE PROJECT?

A. YES.

Q. DURING THAT PERIOD OF TIME YOU WORKED SIX DAYS A WEEK?

A. I BELIEVE SO.

Q. TWELVE HOURS A DAY?

A. ON THE BETTY L, I WORKED WHEN THE BELL WAS IN THE WATER. WHEN THE BELL WAS NOT, THEY SENT ME OFF, TO SAVE MONEY.

Q. MR. THIELST MR. MITTRY, MR. WELLS –

THE COURT: WE KNOW WHO YOU ARE TALKING ABOUT. WE DON'T NEED THE RITUALISTIC STRING OF NAMES ANYMORE.

MR. HILLSMAN: Q. THE DIVE TEAM.

A. YES.

Q. DAY AFTER DAY?

A. YES.

Q. TWELVE HOURS A DAY?

A. YES.

MR. HILLSMAN: IF WE COULD HAVE COUNSEL STIPULATE THAT THE HAAKON AND BETTY L ARE COAST GUARD DOCUMENTED VESSELS, IT WILL SAVE TIME.

MR. KOELZER: I WILL TAKE IT UP AT RECESS.

MR. HILLSMAN: THIS WOULD BE THE POINT I

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[883] THE COURT: YOU MAY CONTINUE.

MR. HILLSMAN: AT THIS TIME I WOULD LIKE –

THE COURT: THE OBJECTION IS OVERRULED. UNLESS THERE IS A DESIRE TO HAVE THE DOCUMENTS AUTHENTICATED, WE WILL RECEIVE THEM IN EVIDENCE.

(PLAINTIFF'S EXHIBITS 40 THROUGH 44 WERE MARKED FOR IDENTIFICATION AND RECEIVED IN EVIDENCE.)

MR. KOELZER: I AM NOT TALKING ABOUT AUTHENTICITY.

THE COURT: THEY ARE RECEIVED IN EVIDENCE.

MR. KOELZER: IT IS RELEVANCY THAT IS THE PROBLEM.

MR. HILLSMAN: WE MOVE 42, 43, AND 44.

THE COURT: PROCEED.

MR. HILLSMAN: Q. LESS [sic] TALK ABOUT THE ARCTIC CAROLYN. THIS IS THE DIVE VESSEL AT THE SITE ON THE DAY OF THE ACCIDENT.

A. THAT IS CORRECT.

Q. ACCORDING TO HER COAST GUARD PAPERS, THE ARCTIC CAROLYN IS A POWERED VESSEL, ENGINE AND PROPELLERS?

A. THAT IS CORRECT.

Q. INDEED, THE ARCTIC CAROLYN WAS LOADED FOR THIS JOB IN PORT HUENEME?

A. YES.

Q. SHE SAILED UNDER HER OWN POWER?

A. YES.

Q. SHE TRANSPORTED ALL OF THE MARTECH DIVE [884] EQUIPMENT WITH HER FROM PORT HUENEME TO POINT LOMA?

A. YES.

Q. THE DIVE GEAR, THE DECOMPRESSION CHAMBER, THE WATERBLASTERS, DIVE STAGE, ALL THAT?

A. YES.

Q. IN ADDITION TO TRANSPORTING THE GEAR, SHE TRANSPORTED YOU FROM PORT HUENEME TO POINT LOMA?

A. YES.

Q. YOU INTENDED TO LIVE ABOARD THE ARCTIC CAROLYN DURING THIS PHASE OF THE PROJECT?

A. YES.

Q. THE ARCTIC CAROLYN WAS EQUIPPED WITH LIVING FACILITIES?

A. YES.

Q. THERE WAS A GALLEY ABOARD THE ARCTIC CAROLYN?

A. YES.

Q. LIVING QUARTERS ABOARD THE ARCTIC CAROLYN?

A. YES.

Q. TOILET FACILITIES, OR A HEAD?

A. YES.

Q. SHE IS EQUIPPED WITH LIFE-SAVING EQUIPMENT, LIFE RINGS?

A. YES.

Q. HORIZON COURSE?

A. YES.

Q. AND RADIO AND RADAR; CORRECT?

A. YES.

[885] Q. WOULD YOU ALSO AGREE THAT SHE HAS A MOLDED OR RAKED BOW?

A. YES.

Q. AFTER DIVING OPERATIONS COMPLETED ABOARD THE ARCTIC CAROLYN, THE DIVE TEAM MOVED TO THE HAAKON?

A. YES.

Q. I AM HOLDING A PICTURE OF THE HAAKON?

A. YES.

Q. YOU AND THE OTHER MARTECH DIVERS OUTFITTED THE HAAKON FOR WORK ON THIS PROJECT AT NATIONAL CITY, DID YOU NOT?

A. YES.

Q. YOU SET UP THE DIVE STATION ABOARD THE HAAKON?

A. YES.

Q. INDEED, IS THIS WHERE THIS PHOTOGRAPH WAS TAKEN, AT THE NATIONAL CITY YARD?

A. YES.

Q. DOES IT SHOW THE DIFFERENT EQUIPMENT YOU AND THE DIVE TEAM SET UP ABOARD THE HAAKON?

A. YES. THE BLUE AND WHITE GEAR ON THE STERN.

Q. ALL OF THE GEAR HERE?

A. YES.

Q. THE HAAKON, UNLIKE THE ARCTIC CAROLYN, IS NOT EQUIPPED WITH AN ENGINE?

A. NO.

Q. SHE IS TYPICALLY TOWED BY TUG?

[886] A. YES.

Q. ONCE ON SITE AND SHE HAS HER ANCHORS IN PLACE, SHE CAN MOVE BACK AND FORTH ON THE ANCHORS BY MEANS OF WINCHES; IS THAT CORRECT?

A. YES.

Q. SHE HAS DIESEL-POWERED ANCHOR WINCHES?

A. I BELIEVE SO, YES.

Q. CARRIES ON HER DIESEL FUEL?

A. ONLY IN THE EQUIPMENT. I DON'T BELIEVE THERE IS FUEL STORAGE TANKS.

Q. FUEL FOR THE EQUIPMENT ABOARD THE HAAKON?

A. IN THE FUEL TANKS OF THE EQUIPMENT.

Q. AFTER THE DIVE EQUIPMENT, THE BLUE AND WHITE EQUIPMENT WE SEE IN EXHIBIT 40, WAS LOADED ABOARD THE HAAKON IN NATIONAL CITY, SHE TRANSPORTED THAT EQUIPMENT OUT TO THE DIVE SITE; IS THAT CORRECT?

A. RIGHT.

Q. ONCE SHE WAS ON THE DIVE SITE, SHE WAS USED IN ADDITION FOR DIVING OPERATIONS, FOR SCREEDING OPERATIONS?

A. YES.

Q. SHE TRANSPORTED THE SCREED OUT THERE, TOO, DIDN'T SHE?

A. I BELIEVE THE SCREED CAME OUT OF THE MATERIAL BARGE.

Q. ONCE SHE WAS ON SITE, THEY TRANSPORTED THE SCREED FROM THE POINT WHERE THE EXISTING OUTFALL ENDED TO THE TERMINUS WHERE THE EXTENSION ENDED; [887] CORRECT?

A. YES. IT WAS MOVED ALONG THE BOTTOM, YES.

Q. THAT WAS A DISTANCE OF ABOUT THREE TO FOUR MILES?

A. THREE MILES, AS I RECALL.

Q. SHE MADE MOST OF THAT DISTANCE BY CRAWLING ALONG ON HER OWN ANCHOR LINES?

A. YES.

Q. SHE WAS ACTUALLY ABLE TO PULL HERSELF THAT ENTIRE DISTANCE OVER A PERIOD OF MONTHS?

A. RIGHT. WITH VARIOUS ANCHOR SPRINTS.

Q. THE HAAKON WAS ON LOCATION OFF POINT LOMA NIGHT AND DAY; IS THAT CORRECT, SIR?

A. YES.

Q. SHE IS EQUIPPED WITH VARIOUS LIGHTS TO FACILITATE NIGHT OPERATIONS?

A. YES.

Q. AND RUNNING OR RIDING LIGHTS, PER COAST GUARD REGULATIONS, SO VESSELS IN THE AREA WILL BE ABLE TO IDENTIFY HER?

A. YES.

Q. THE HAAKON IS ALSO EQUIPPED WITH LIFE-SAVING EQUIPMENT?

A. THERE ARE LIFE RINGS.

Q. THE HAAKON HAS TOILET OR HEAD FACILITIES?

A. A TOILET.

Q. SOME RUDIMENTARY FOOD PREPARATION FACILITIES?

[888] A. NOT THE HAAKON.

YOU ARE RIGHT, THE HAAKON DOES.

Q. ALSO A CHANGING ROOM?

A. YES.

Q. IN ADDITION TO THE SCREED, THE DIVING EQUIPMENT, THE HAAKON ACTUALLY TRANSPORTED PEOPLE WHO WORKED ABOARD HER AS SHE WAS MOVING ALONG THE DIVE SITE?

A. RIGHT.

Q. NOW, AFTER OPERATIONS WERE COMPLETED ABOARD THE HAAKON, YOU MOVED ABOARD THE BETTY L; IS THAT CORRECT?

A. YES.

Q. THE BETTY L IS A LARGE 6,000-TON SEAGOING, PIPE-LAYING BARGE?

A. YES.

Q. EQUIPPED WITH A HELIPORT?

A. YES.

Q. GALLEY FACILITIES?

A. NO GALLEY FACILITIES.

Q. YOU GUYS WERE WORKING 12 HOURS A DAY?

A. YES.

Q. YOU TOOK YOUR MEALS ABOARD THE BETTY L?

A. CARRIED THEM OUT EVERY DAY.

Q. YOU EAT THOSE IN A CREW ROOM OR CHANGING ROOM?

A. WHENEVER YOU ARE WORKING.

Q. THE BETTY L WAS IN OPERATION 24 HOURS A [889] DAY?

A. YES.

Q. EQUIPPED WITH LIGHTS?

A. YES.

Q. EQUIPPED WITH RUNNING OR RIDING LIGHTS, PER COAST GUARD REGULATIONS?

A. YES.

Q. ALSO EQUIPPED WITH ANCHORS?

A. YES.

EXCUSE ME. SHE DID NOT CARRY THE ANCHORS. THE ANCHORS WERE SURGE MOORING, WHICH WAS PRE-SET ANCHORS. WE WOULD RUN A MOORING LINE OUT TO THE MOORING AND PULL IN.

Q. WHEN SHE ARRIVED AT THIS JOB SITE, SHE CARRIED HER ANCHORS DOWN FROM RIO VISTA?

A. I DON'T KNOW WHAT SHE HAD.

Q. YOU ARE AWARE THAT THE BETTY L WAS TOWED BY SEA FROM THE GOLDEN GATE ALL THE WAY DOWN TO NATIONAL CITY JUST FOR THIS PROJECT?

A. YES.

Q. AND, FORGIVE ME, DID YOU HELP RIG THE BETTY L FOR THIS JOB WHEN SHE WAS ALONGSIDE THE PIER AT NATIONAL CITY?

A. AS FAR AS INSTALLING THE DIVING SYSTEM.

Q. BACK AFT, BY THE CRANE?

A. MORE TO ONE SIDE, YES.

Q. WHEN THE BETTY L WAS DELIVERED ON SITE AT P.L.C., SHE TRANSPORTED THE DIVE EQUIPMENT WITH HER [890] ON SITE; CORRECT?

A. YES.

Q. AS WITH THE HAAKON, THE BETTY L HAS ABILITY TO MOVE BACK AND FORTH ON THE ANCHOR LINES?

A. YES.

Q. THE BETTY L DID JUST THAT FOR A DISTANCE OF SOME FOUR MILES WHILE LAYING PIPE?

A. THREE MILES.

Q. ONCE THE BETTY L WAS DELIVERED OFFSHORE, SHE REMAINED OFFSHORE SIX-AND-A-HALF MONTHS, FOR THE DURATION OF HER OPERATIONS ON THE POINT LOMA PROJECT; ISN'T THAT CORRECT?

A. I DON'T THINK THE BETTY L CAME IN. THE HAAKON DID ON OCCASION.

Q. WHEN SHE LEFT NATIONAL CITY, SHE CARRIED A FULL COMPLEMENT OF PIPE SECTIONS; IS THAT CORRECT?

A. DON'T RECALL.

Q. WE CAN CALL A WITNESS TO VERIFY THAT.

DO YOU RECALL WHETHER OR NOT THE BETTY CARRIED A ROCK SUPPLY WITH HER WHEN SHE LEFT NATIONAL CITY?

A. I DON'T RECALL.

Q. YOU DON'T REMEMBER ONE WAY OR THE OTHER?

A. I DON'T REMEMBER.

Q. THE HORSE WE HAVE BEEN HEARING SO MUCH ABOUT, THAT IS THIS LARGE PIECE OF EQUIPMENT HANGING FROM THE CRANE?

A. THAT IS CORRECT.

[891] Q. THAT WAS LOADED ABOARD AT NATIONAL CITY?

A. YES.

Q. ALSO TRANSPORTED TO THE DIVE SITE ABOARD THE BETTY L?

A. IT WAS.

Q. THE BETTY L IS EQUIPPED WITH DIESEL-POWERED ENGINES?

A. POWER-SUPPLIED ENGINES, HYDRAULIC AND ELECTRIC.

Q. SHE HAS HER OWN ELECTRICAL POWER?

A. YES.

Q. INDEED, SO DOES THE CAROLYN.

FUELED BY DIESEL-POWERED EQUIPMENT?

A. YES.

Q. THE BETTY L HAS FUEL TANKS TO SUPPLY THE DIESEL-POWERED EQUIPMENT WITH FUEL?

A. I DON'T KNOW THE FUEL ARRANGEMENTS.

Q. ON DECKS THERE ARE CHAINS AND BALER USED FOR MOORING VESSELS, ISN'T THAT RIGHT, SIR, ON BOTH THE BETTY L AND THE HAAKON.

A. THAT'S RIGHT.

Q. BOTH THE HAAKON AND BETTY L ARE EQUIPPED WITH FUEL-POWERED PERMANENT REVOLVING CRANES; IS THAT CORRECT?

A. YES.

Q. BOTH THE HAAKON AND BETTY L HAVE RADIO CALL SIGNS, THEY HAVE RADIOS ABOARD?

A. I NEVER USED THE V.H.F. WE USE TELEPHONES.

[892] Q. YOU HAD RADIO COMMUNICATIONS TO COMMUNICATE WITH THE BEACH FROM BOTH THE HAAKON AND THE BETTY L?

A. YES.

Q. HOW DID THOSE VESSELS SITUATE THEMSELVES ON SITE? HOW DID THEY KNOW THEY WERE DIRECTLY IN THE PATH OF THE PIPE-LAYING OPERATION?

A. FOLLOWED THE LASER.

Q. THEY HAD SPECIAL LASER NAVIGATION EQUIPMENT?

MR. KOELZER: OBJECTION. WORD OF ART. IT IS DECEPTIVE TO USE THAT FORM. THEY MAY HAVE HAD LASER EQUIPMENT. TO ADD THINGS IS IMPROPER SUGGESTION.

THE COURT: THE OBJECTION IS OVERRULED.

MR. HILLSMAN: Q. SO BOTH THE HAAKON AND BETTY L HAD LASER-POWERED NAVIGATION TO ASSIST THE VESSELS' CREWS TO SITUATE THEM OVER PIPE?

A. NOT ENTIRELY CORRECT. THE LASER WAS ON THE BEACH. A MAN WOULD STAND NEXT TO A HANDRAIL. WHEN THE LASER HIT HIM IN THE EYE, THEY WERE ON LINE.

Q. THOSE BARGES HAD ABILITY TO SHIFT BACK AND FORTH ON THE ANCHOR LINES UNTIL DIRECTLY ON LINE?

A. ADJUST, YES.

Q. INDEED, BEING PRECISELY IN POSITION ON LINE ABOVE THE FAIRWAY WAS PARTICULARLY IMPORTANT FOR THE OPERATION OF BOTH VESSELS?

A. WITHIN A RANGE OF EIGHT FEET, YES.

Q. NOW, WHEN SHE WAS OPERATING ON SITE, THE [893] ARCTIC CAROLYN ESSENTIALLY FUNCTIONED AS THE HOST VESSEL FOR DIVE OPERATIONS; CORRECT?

A. YES.

Q. WHEN SHE WAS FUNCTIONING ON SITE, THE HAAKON, AMONG OTHER THINGS, OPERATED AS A HOST VESSEL FOR DIVE OPERATIONS; IS THAT CORRECT?

MR. KOELZER: OBJECTION; FORM.

THE COURT: OVERRULED.

A. WE WERE DIVING FROM THE STERN OF THE HAAKON.

MR. HILLSMAN: Q. IN ADDITION TO OPERATING AS A HOST SITE FOR DIVE OPERATIONS, THE HAAKON ALSO PERFORMED SCREEDING, LAYING THE PIPE PATH; CORRECT?

A. THERE WAS VERY LITTLE. THAT WASN'T – THE TWO OPERATIONS WEREN'T SIMULTANEOUS.

Q. I UNDERSTAND.

A. THEY DID BOTH OPERATIONS, YES.

Q. THE HAAKON ALSO HELPED PERFORM THE PHASE OF THE WORK IN WHICH THE APRON IN FRONT OF THE PIPE WAS DESTROYED; IS THAT CORRECT?

A. THAT IS CORRECT.

Q. WOULD YOU DESCRIBE THAT OPERATION TO THE JURY SO WE UNDERSTAND WHAT IT ENTAILED.

A. I DON'T REMEMBER THE DIMENSIONS. THERE WAS A LARGE CEMENT GRID SET. IT WAS

SUPPOSED TO CRADLE AN EXTENSION PIPE WHEN IT WAS SET. BUT IT WAS SET IMPROPERLY. THEY DROPPED CONCRETE DOWN THROUGH A PIPE, SO IT DOESN'T DIFFUSE, TO KEY IT INTO THE [894] BOTTOM. SO IT WAS ESSENTIALLY A CONCRETE BOX FILLED, BLOCK OF CELLS FILLED, WITH CONCRETE. IT WAS A FOOT HIGH, AS I RECALL, AND WE WERE TRYING TO BREAK IT UP, AND WE WERE HOPING TO PULL IT OUT IN ONE PIECE. WE EVENTUALLY HAD TO BREAK IT AND REMOVE THE DEBRIS.

Q. ALL THAT WAS DONE WITH EQUIPMENT FROM THE DECKS OF THE HAAKON?

A. YES.

Q. THAT EQUIPMENT WAS TRANSPORTED OUT TO THE SITE AND BACK TO NATIONAL CITY ABOARD THE HAAKON?

A. NO. NOT THE TOOLS WE EVENTUALLY USED.

Q. LET ME ASK YOU THIS. LET'S TURN TO THE BETTY L.

WOULD YOU AGREE THE BETTY L WAS USED FROM TIME TO TIME AS A HOST VESSEL FOR DIVE OPERATIONS?

MR. KOELZER: OBJECTION TO THE FORM.

THE COURT: OVERRULED.

A. WE DOVE FROM THE HAAKON.

MR. HILLSMAN: Q. IN ADDITION TO THAT, SHE OPERATED AS THE PIPE-LAYING VESSEL?

A. YES.

Q. AND OPERATED AS THE TRIMMING OR ROCKING VESSEL?

MR. KOELZER: SAME OBJECTION ALL THE WAY THROUGH, YOUR HONOR.

THE COURT: OVERRULED.

A. IT ALSO DUMPED ROCK, YES.

MR. HILLSMAN: Q. ONE LAST QUESTION.

[895] WAS IT YOUR IMPRESSION THAT GIL HOEFLICH EXPECTED TO DRIVE HOME AFTER THIS ACCIDENT?

A. THAT WAS HIS IMPRESSION, YES.

Q. JOHN THIELST, HE REMAINED ABOARD THE ARCTIC CAROLYN WITH YOU THAT NIGHT, DIDN'T HE?

A. I DON'T REMEMBER. I STATED THAT.

MR. HILLSMAN: THAT'S ALL I HAVE.

RECROSS-EXAMINATION

MR. KOELZER: Q. SO WE ARE CLEAR ON A NUMBER OF POINTS, THE BETTY L AND THE HAAKON DID NOT HAVE, QUOTE, LASER NAVIGATION EQUIPMENT ON BOARD THEM, DID THEY?

A. NO.

Q. THAT'S BECAUSE, CONTRARY TO WHAT WAS SUGGESTED TO YOU IN THE QUESTION BEFORE, THEY WEREN'T IN NAVIGATION, WERE THEY?

MR. HILLSMAN: YOUR HONOR, THAT IS A TERM OF ART. OBJECTION.

THE COURT: OVERRULED. YOUR OBJECTION. HIS OBJECTION.

MR. HILLSMAN: I WANTED A RECORD.

MR. KOELZER: Q. DO YOU KNOW WHAT I MEAN BY PHRASE "IN NAVIGATION"?

A. NO.

Q. FAIR ENOUGH. I WILL BACK UP.

DID THEY MOVE AROUND, SAIL FROM POINT TO POINT, THE HAAKON AND THE BETTY L?

A. THEY FOLLOWED THE ROAD BED.

* * *

[904] MR. HILLSMAN: AT THIS TIME WE WOULD LIKE TO RECALL MR. HOEFLICH BRIEFLY.

THE COURT: YOU MAY PROCEED.

MR. HILLSMAN: AT THIS TIME WE WOULD LIKE TO RECALL MR. HOEFLICH BRIEFLY.

GILSON HOEFLICH, HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED FURTHER AS FOLLOWS:

DIRECT EXAMINATION (RESUMED)

MR. HILLSMAN: Q. YOU APPRECIATE YOU ARE STILL UNDER OATH?

A. YES.

Q. YOU WERE PRESENT WHEN MR. THOMAS WAS ON THE STAND TODAY?

A. YES.

Q. DID YOU EVER TELL ED THOMAS THAT YOU WANTED TO DRIVE HOME ON THE DAY OF THE ACCIDENT?

A. NO, I DIDN'T.

Q. DID YOU HAVE A CAR ON THE DAY OF THE ACCIDENT?

A. NO. I DROVE DOWN IN JOHN THIELST'S TRUCK.

Q. YOU AND MR. THIELST HAD INTENDED TO LIVE ABOARD THE ARCTIC CAROLYN FOR THE DURATION OF THE PROJECT, HAD YOU NOT?

A. YES. I WAS ACTUALLY PLANNING ON RIDING THE CAROLYN DOWN. HE OFFERED TO DRIVE.

Q. YOU DIDN'T HAVE A CAR TO TAKE YOU BACK UP TO SANTA BARBARA THAT NIGHT?

* * *

[934] MOON, AN EXPERT IS RIGHT WHEN HE SAYS HE CAN'T. NOT OFTEN.

IN THE EVENT OF AN ADVERSE VERDICT, UNLESS WE CAN WORK OUT A STIPULATION WE WANT, AS PART OF THE TRIAL RECORD, THE FACT THERE WAS A $10,000 PAYMENT MADE.

MR. HILLSMAN: WE CAN STIPULATE.

THE COURT: THANK YOU.

MR. HILLSMAN: THAT TAKES US TO THE ISSUE OF THE PAST EMPLOYMENT HISTORY. WOULD THIS BE AN APPROPRIATE TIME TO MAKE THE MOTION ON THAT?

THE COURT: YES.

MR. HILLSMAN: AS I UNDERSTAND, THE COURT GRANTED MY MOTION TO BAR THE INFORMATION. COUNSEL GAVE ME AN OPPORTUNITY TO REVIEW THE STIPULATION. IT IS ACCURATE. IT DOES NOT DEAL WITH THE ENTIRETY OF THE PAST EMPLOYMENT HISTORY.

THE COURT: LET ME TELL YOU THE PRELIMINARY REACTION. THIS IS NOT A RULING; IT IS A STATEMENT OF ATTITUDE AT THIS POINT.

THE MATERIAL THAT COUNSEL HAS BEEN PROVIDED THUS FAR IS APPROPRIATE TO BE RECEIVED, WILL BE RECEIVED, IN EVIDENCE.

AT SOME POINT, THE MATERIAL GOING BACK INTO THE PAST BECOMES SUBJECT TO BEING TOO REMOTE FROM THE FACTS IN QUESTION HERE. THAT IS THE CONCERN I HAVE, IS WHETHER THE CUTOFF IS APPROPRIATE.

MR. HILLSMAN: IN MY VIEW, THE CUTOFF IS [935] THE PLAINTIFF'S ASSIGNMENT AT THE TIME OF THE ACCIDENT.

IN THIS CIRCUMSTANCE WE TAKE THE POSITION A JONES ACT SEAMANS STATUS SINKS OR

SWIMS WITH ASSIGNMENT AT THE TIME OF THE ACCIDENT.

KEITH VS. S.S. GOLDSTONE, 81 CAL.APP.3D 699, THE LANGUAGE AT 704, IN THIS COURT. CALIFORNIA COURTS ARE OBLIGED TO FOLLOW THE NINTH CIRCUIT RULE. WHERE THERE IS A CONFLICT AMONG THE CIRCUITS, THE COURT WILL FIND THE RULE IS THAT THE FLEET SEAMAN DOCTRINE DOES NOT APPLY, THAT A SEAMAN'S STATUS IS DETERMINED SOLELY FROM ASSIGNMENT AT THE TIME OF THE INJURY.

THE CASE I WOULD CITE IS STANFIELD VS. SHELLMAKER.

THE COURT: IS THAT IN YOUR BOOK?

A. YES, 869 F. 2D 521.

THE COURT: STANFIELD AGAINST SHELLMAKER.

MR. HILLSMAN: SHELLMAKER, 869 F. 2D 525. THIS ISSUE, BY THE WAY, WAS ADDRESSED BY THE DISTRICT COURT OF HONOLULU IN A CASE KJAR, KJAR, VS. AMERICAN DIVERS. THE COURT WILL FIND THAT CITATION IN THE TRIAL BRIEF.

THE COURT: WHAT IS YOUR POSITION BASED ON, STANFIELD AND THE OTHER AUTORITIES [sic]?

MR. HILLSMAN: MY POSITION IS THAT THE COURT MUST DETERMINE THE PLAINTIFF'S JONES

ACT STATUS FROM THE FOUR CORNERS OF THE ASSIGNMENT AT THE TIME

* * *

[1172] VOLUME VIII

January 3, 1995

[1175] * * *

ISSUE, NOT ONLY THE EFFECT OF THE STATUTE, BUT ALSO THE QUESTION OF –

I HAVE A PROBLEM, MR. HILLSMAN, WITH WHETHER THERE IS EVIDENCE THAT THE INJURY WAS CAUSED BY NEGLIGENCE ON THE PART OF SEA-LAND IN ITS CAPACITY AS A SHIP OWNER.

MR. KOELZER: DO YOU MEAN MARTECH.

THE COURT: SORRY. RIGHT.

WHAT DO YOU SAY?

MR. HILLSMAN: I UNDERSTAND, YOUR HONOR.

I BELIEVE THAT THE PROPOSED INSTRUCTION WHICH WE SUBMITTED ON THE POINT CORRECTLY STATES THE LAW, AS I UNDERSTAND THE LAW.

MARTECH, AS A VESSEL OWNER, WAS UNDER A DUTY TO PROVIDE VESSEL AND TOOLS AND EQUIPMENT PRIOR TO THE COMMENCEMENT OF DIVE OPERATIONS WHICH WERE REASONABLY SAFE, IN OTHER WORDS, WHICH WOULD PERMIT AN EXPERT DIVER TO PERFORM HIS ACTIVITIES IN REASONABLE SAFETY.

THE COURT: I THINK IT IS DOUBTFUL; I AM NOT SURE I WOULD LET A VERDICT STAND ON THAT POINT.

MR. HILLSMAN: I UNDERSTAND.

THE COURT: I THINK YOU HAVE A FAIR JURY ISSUE ON JONES ACT SEAMAN STATUS. I SEE SOME DANGER THAT A JURY WILL HAVE TROUBLE WITH THAT ISSUE AND SAY, "WE ARE INSTRUCTED ON THIS 905(B), THAT ONE IS EASY, LET'S FIND NO SEAMAN STATUS ON THE JONES ACT AND INSTEAD AWARD A RECOVERY UNDER 905(B)." THAT IS

* * *

MANSON

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Attorneys for Defendants MARTECH USA, INC., POINT LOMA CONSTRUCTORS, MORRISON KNUDSEN CORPORATION, and MANSON CONSTRUCTION & ENGINEERING CO.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GILBERT HOEFLICH, Plaintiff, v. MARTECH INTERNATIONAL INC., MARTECH USA INC., POINT LOMA CONSTRUCTORS, A Joint Venture, between Morrison-Knudsen Corp., and Manson Construction & Engineering Co., MORRISON-KNUDSEN CORP., MANSON CONSTRUCTION & ENGINEERING CO., RED & WHITE DIVING, INC., and, DOES 1 through 25, Defendants.	CASE NO. 950 673 DEFENDANT'S NOTICE OF MOTION AND MOTION TO VACATE THE "FINAL JUDGMENT AFTER APPEAL" OR, IN THE ALTERNATIVE, TO STAY ENFORCEMENT OF THE "FINAL JUDGMENT AFTER APPEAL"; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF CAROLYN J. SHIELDS Date: December 12, 1996 Time: 9:30 a.m. Place: Department 10

PLEASE TAKE NOTICE THAT defendant MARTECH USA INC. (hereinafter "defendant," or "Martech"), through Lane Powell Spears Lubersky, its attorneys of record, will on December 12, 1996, at 9:30 a.m., before this Court in Department 10, located at 633 Folsom Street, Room 414, San Francisco, California 94107-3601, move for an order to vacate the "Final Judgment After Appeal" ("Judgment") filed by plaintiff and signed by this Court. In the alternative, defendant will move for a stay of an execution on the Judgment until after a decision has been made by the Supreme Court of the United States on defendant's Petition for a Writ of Certiorari.

The motion will be made on the ground that the Judgment is void because it was prematurely entered. Specifically, the Judgment was entered prior to a decision by the court regarding plaintiff's claim for maintenance. Additionally, if plaintiff is entitled to maintenance, the Judgment was entered prior to a decision by the court regarding the amount of damages plaintiff may recover as maintenance. Until the court resolves these outstanding issues, any judgment entered in this case is premature and void. Accordingly, the court should vacate the Judgment because it was entered prior to a final resolution of all the claims made in this case.

Alternatively, defendant will request a stay of any execution on the Judgment based upon the Court's inherent authority to protect the ends of justice. In the absence of a stay, plaintiff could enforce the Judgment and thereby moot the controversy between the parties before the Supreme Court of the United States has an opportunity to rule on defendant's petition for writ of certiorari. Thus, a stay of enforcement of the Judgment is

necessary to protect defendant's right to seek review of this case by the Supreme Court of the United States.

The motion will be based on this notice of motion, on the declaration of Carolyn J. Shields, and the Memorandum of Points and Authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

DATED this 27th day of November, 1996.

LANE POWELL SPEARS
LUBERSKY LLP

By /s/ Carolyn J. Shields
George J. Koelzer
Carolyn J. Shields
Attorneys for Defendant
MARTECH USA INC.

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

I

PROCEDURAL BACKGROUND

Plaintiff brought this maritime personal injury action seeking to recover damages, which he allegedly suffered while working as a seaman. During the trial of this case, the parties stipulated that plaintiff's entitlement to maintenance[1] would be decided by the Court after the jury returned its verdict. Shields Decl. ¶ 2. After the jury returned a verdict in favor of plaintiff but before the court decided plaintiff's entitlement to maintenance, the court granted defendant's motion for JNOV ("JNOV order"), which denied plaintiff any recovery. After the verdict and before resolution of the outstanding maintenance claim and before the JNOV order, plaintiff prepared, and the trial court signed, a "Judgment on Special Verdict." This first "judgment" is nonfinal because it does not dispose of the outstanding maintenance claim.

On plaintiff's appeal from the final judgment entered on the JNOV order, defendant objected on the ground that it was, among other things, taken from a nonfinal order, the "Judgment on Special Verdict." The Court of Appeal reversed the judgment entered on the trial court's JNOV order, and the Supreme Court of California denied defendant's petition for review. As a result, the Court of

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[1] *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527, 58 S.Ct. 651, 653, 82 L.Ed. 993 (1938) (maintenance includes a seaman's right to food and lodging if he falls ill or becomes injured while in the service of the ship).

Appeal issued its remittitur and jurisdiction over this case was transferred back to the trial court. Shields Decl. ¶ 3.

Rather than pursue his claim to maintenance, plaintiff filed a second nonfinal "judgment," the "Final Judgment After Appeal," and a cost bill. Over defendant's objection, the Judgment was signed by this court. Shields Decl. ¶ 4. Defendant has responded by moving to vacate the Judgment and to strike the cost bill.

II

THE JUDGMENT IS VOID BECAUSE IT WAS PREMATURELY ENTERED

It is beyond dispute that a judgment is a final adjudication of all the claims raised in a lawsuit. Cal. Code of Civ. Proc. § 577. It is equally fundamental that a judgment may not be entered until after all the issues raised by the parties have been resolved. *City of Huntington Beach v. Superior Court of Orange County* (1978) 78 Cal.App.3d 333, 339, 144 Cal.Rptr. 236, 239 (judgment was premature when entered after a finding on liability but before a finding on damages). The courts uniformly hold that a judgment is premature and void when it is entered prior to the final resolution of all the claims raised in the lawsuit. *Trani v. R.G. Hohman Enterprises, Inc.* (1975) 52 Cal.App.3d 314, 316, 125 Cal.Rptr. 34, 35 (premature judgment was "patently void"); *Ohio Casualty Insurance Co. v. Northwest Mutual Insurance Co.* (1971) 17 Cal.App.3d 204, 207, 94 Cal.Rptr. 586, 587 (premature judgment was a nullity); *Burke v. City and County of San Francisco* (1952)

111 Cal.App.2d 314, 316, 244 P.2d 708, 710 (premature judgment was ineffective).

The rationale of *Shapiro v. Equitable Life Assurance Society* (1946) 76 Cal.App.2d 75, 98-99, 172 P.2d 725, 738, requires that the Judgment be vacated as void. In *Shapiro*, the parties agreed that the trial court would decide certain issues after the jury returned its verdict. Despite this agreement, a judgment was entered after the jury returned its verdict but before the court had ruled on the issues deferred.

In the subsequent appeal, the *Shapiro* court held:

> *Where special issues which form only a portion of the controversy between the parties to the action are submitted to a jury and remaining issues are tried by the court and findings of fact made thereon, no judgment can be entered in the case at the time the jury renders its verdict. The case has not been tried and the trial has not been concluded until the court has rendered its decision disposing of all issues submitted to it, and there is no decision until the court has passed upon the facts and drawn its conclusions thereon.*
>
> . . .
>
> *The trial of this action had not been concluded when the verdict of the jury was rendered, and the judgment entered thereon having been premature was void and of no effect.*

Id. (emphasis added). *See also Alton v. Rogers* (1954) 127 Cal.App.2d 667, 678, 274 P.2d 487, 494 (a judgment is void when it is entered prior to resolution of all issues in a case).

Like the judgment in *Shapiro,* the Judgment in this case was premature because it was entered before all of the causes of action had been decided. During the trial of this case, the parties stipulated on the record that the court would decide plaintiff's claim for maintenance after the jury returned its verdict. However the Court never decided the issue of maintenance. Because the Judgment was entered prior to a determination of plaintiff's claim for maintenance, the Judgment is void and should be vacated. 7 Witkin, *California Procedure,* Judgment, § 52 p. 489 (3d ed. 1985) (a judgment in a bifurcated trial is not enforceable unless it is entered after all the issues have been determined).

III

IN THE ALTERNATIVE, DEFENDANT REQUESTS A STAY OF EXECUTION ON THE JUDGMENT UNTIL AFTER A RULING ON ITS PETITION FOR WRIT OF CERTIORARI

This Court has the inherent authority to stay enforcement of a judgment whenever the ends of justice so require. *First National Bank of San Pedro v. Stansbury* (1931) 214 Cal. 190, 193, 5 P.2d 11, 12 (Shenk, J. dissenting). In the absence of a stay in this case, plaintiff could enforce the Judgment and thereby moot the controversy between the parties before the Supreme Court of the United States has an opportunity to rule on defendant's' petition for a writ of certiorari. Because justice requires that a party have the opportunity to fully litigate its case, enforcement of the Judgment should be stayed pending a decision on the defendant's Petition for Writ of Certiorari.

Before the Court of Appeal issued its remittitur, defendant admittedly could have moved for a stay pending decision by the Supreme Court of the United States on its petition for a writ of certiorari. California Rule of Court 25(c). However, defendant opted not to request a stay at that time because plaintiff's claim for maintenance had not been litigated. Requesting a stay in the absence of a final judgment would have been unnecessary, a waste of the parties' and the court's time, and would have delayed final determination of maintenance and final judgment in this case.

It would be a more efficient use of scarce judicial resources to simultaneously petition the Supreme Court of the United States for a writ of certiorari while litigating the maintenance issue in the trial court. Defendant did not request a stay of the issuance of the remittitur because it had no need to. The need to request a stay only arose when plaintiff filed his so-called "Final Judgment After Appeal."

That plaintiff filed the Judgment without raising the issue of maintenance was a surprise to defendant: maintenance is an element of damages traditionally sought by seamen. Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-28 (2d ed. 1994) (a seaman's right to maintenance predates medieval sea codes). If this Court decides that plaintiff has waived his right to maintenance, that waiver should not prevent defendant from exercising its right to petition the Supreme Court of the United States for a writ of certiorari.

Plaintiff's filing of the Judgment is an attempt to preempt further review of this case. If plaintiff had

intended to waive his alleged right to maintenance he might have done so at any time after the jury returned its verdict. Instead, knowing that defendant intended to petition the Supreme Court for a writ of certiorari, plaintiff filed the Judgment, waiting until the Court of Appeal had issued its remittitur to do so.

Justice requires that the defendant have the right to fully litigate this case. Accordingly, any enforcement of the Judgment should be stayed pending a determination of defendant's Petition for Writ of Certiorari.

IV
CONCLUSION

For the reasons set forth above, defendant respectfully requests that this Court vacate the judgment. In the alternative, defendant respectfully requests a stay of enforcement of the Judgment until the Supreme Court of the United States has ruled on defendant's Petition for Writ of Certiorari.

DATED: November 27, 1996

LANE POWELL SPEARS
LUBERSKY LLP

By /s/ Carolyn J. Shields
George J. Koelzer
Carolyn J. Shields
Attorneys for Defendant
MARTECH USA INC.

PLAINTIFF'S EXHIBIT 950673

TED ROCHE LOG OF INJURY

9/9/92

1355 HRS
Ed Thomas notified Ted Roche at 1:55 p.m. that Gil Hoeflich had been injured 57 minutes into a 210' dive. He was using a 10,000 psi waterblaster to remove marine growth and material from the end of an outfall pipe. Gil cut the top of his left foot caused by high pressure water.

1400 HRS
Notified Dr. Linaweaver SBMC; informed of injury; will keep him informed as we know more.

1410HRS
Ted talked to Tim Hanson of Pt. Loma Constructors; told him to jump a standby diver if necessary to check for bleeding. Tim has contacted UCSD and alerted them. Ted talked to Linaweaver got right #; will assess vitals; etc when we get him in the chamber; informed me to take precautions for shock.

1430 HRS
Paged Tom Thomas

1432 HRS
Called Bob Burcham, left message to return call ASAP.

1440 HRS
Informed Bob Burcham

1450 HRS
Sent 1st Report of Injury to Bob Burcham

1520 HRS
Informed Tom Thomas

1525 HRS
Report from Tim Hanson, Gil in chamber. Pulse is good; wrapping now direct pressure stops bleeding; not too cold; injury on top of left foot is as follows:

1 1/4" long
1/4" deep
1/4" wide

9/10/92
A.M.
Called hospital talked to nurse; Dr. Todd Lincoln will call me back. (surgeon)

Dr. Chu (619) 543-6737; blew feces into the foot; Dr. Todd Lincoln – lower half of the foot, separated all the tendons and muscle; raw feces injected into the blood stream into tissue and at this point is infected to the bone. Surgery last night, open up the foot, irrigated and cleaned; extensive tendon and muscle damage.

1130 HRS
Report from Dr. Linaweaver
Dr. Linaweaver talked to Dr. Neuman; disastrous injury, through the foot into the base of the foot. Orthopedic staff working on injury. Chances of saving the foot as miraculous.

Gils personal support/Hyperbaric staff.
Hyperbaric Treatment
Major effect is to clean out all foreign material imbedded into the bone; into the porous portion. Next major step is to remove more damaged tissue material.

Notify CAL OSHA and USCG

Definitely infected; surgery again this afternoon to go in to irrigate and monitor the infection; will continue to monitor. Concern infection will spread into heart and lungs. The next 2 days are very critical; will be in the hospital through the weekend.

Did blood cultures.

Dr. Linaweaver will consult with Dr. Neuman; about hyperbaric treatment.

We discussed protective devices that could be developed i.e. shin guard, foot guard, chain saw chaps; also vendor that sells items.

9/11/92
0915 HRS
Update from Dr. Linaweaver:
Material that got imbedded was literally blown into the bone and tissue, today more debridement. Problem – can get chronically infected. Possible definite loss of part of foot. Suggested contact Dr. Neuman; agreed to bring him on as a consultant; hyperbaric facility on site. Infection disease guy is involved. Doctors very concerned that material is blasted into the bone. Most concerned about tendons and bone; may have better feel on the situation later today.

PLAINTIFF'S EXHIBIT 950673

(LOGO) UCSD
MEDICAL CENTER
University of California,
Medical Center

200 West Arbor Drive
San Diego, CA 92103

DISCHARGE SUMMARY

NAME: HOEFLICH, Gil **UNIT NUMBER:** 1 45 95 78

ADM DATE: 09-09-92 **DIS DATE:** 10-21-92 **DICTATOR:** R. Rothen

ATTD PHYSICIAN: M. Botte/Rives

HISTORY OF PRESENT ILLNESS: The patient is a 35-year-old white male who was employed as a deep sea diver who sustained an insertion injection injury of raw sewage into his left foot on September 9, 1992. The patient was brought to the Emergency Department and underwent emergent debridement and four-compartment fasciotomy in the Operating Room. He was then admitted to the hospital for further antibiotic coverage, as well as debridements.

PAST MEDICAL HISTORY: Noncontributory.

PAST SURGICAL HISTORY: Tonsillectomy as a child.

ALLERGIES: No known drug allergies.

CURRENT MEDICATIONS: None.

SOCIAL HISTORY: Noncontributory.

FAMILY HISTORY: Noncontributory.

REVIEW OF SYSTEMS: Noncontributory.

PHYSICAL EXAMINATION: On physical examination, the patient was a healthy-appearing young male. Examination of head, eyes, ears, nose and throat was normal. Chest and lungs were clear. Heart was regular rate and rhythm. Abdomen was soft. Musculoskeletal examination revealed laceration over the middorsum of his left foot, with marked tenderness to palpation. He had decreased sensation to light touch over his dorsal toes, and he had tender, tense compartments. He did have good capillary refill.

LABORATORY DATA: X-ray evaluation showed no bony injury, but air tracking up through his tendon sheaths to the trochanter navicular joint.

HOSPITAL COURSE: The patient was admitted to the hospital and was taken directly to the Operating Room where he underwent fasciotomy and decompression of his foot, as well as extensive debridement. He was then started on triple antibiotics, to include Flagyl, gentamicin, cefazolin, and Ancef. He was then taken back to the Operating Room daily for further debridements.

Through the course of his hospitalization, he grew out of his wound Staphylococcus epidermidis, Bacillus, gram-negative rods, Escherichia coli, Enterococcus faecalis, Klebsiella pneumonia; all consistent with raw sewage injection.

On hospital day number five, the patient's penicillin, Ancef, and Flagyl were discontinued, and he was continued on gentamicin and Timentin. He was also given

Heptavax and hepatitis B immune globulin. As he continued to be febrile, he was started on Amikacin, after consultation with the Infectious Disease Service. For full details on his operative procedures, please refer to his operative notes.

On September 15, 1992, the patient was started on hyperbaric oxygen treatments twice a day and his Timentin was changed to imipenem. Over the next few weeks, the patient continued to spike intermittent fevers and continued on the whirlpool and hyperbaric oxygen therapy.

By the end of the patient's hospitalization, his initially large dorsal wound had closed to approximately 1/4 size in circumference with resolution of some ostemyelitis of his second metatarsal. The wounds from his fasciotomy sites healed well by secondary intention. Repeat cultures taken on October 6, 1992 showed the patient still growing Klebsiella, Pseudomonas, and Staphylococcus epidermidis from his wounds. He was continued on his imipenem and Amikacin.

On October 9, 1992, the patient developed nausea, which was intermittent, and he was seen by the Department of Gastroenterology in consultation. They felt that he had gastroenteritis, and he was started on Mylanta, as well as Zantac, with improvement of his symptoms. After several weeks, the patient's wounds had healed sufficiently, and his cultures were negative on October 20, 1992. He was afebrile off the antibiotics, and it was felt that he could be discharged to home.

DISCHARGE INSTRUCTIONS: Keep left lower extremity elevated at all times. Continue outpatient

hyperbaric oxygen therapy, as well as outpatient whirlpool therapy every day.

DISCHARGE MEDICATIONS: Vicodin, iron sulfate, Zantac.

DISPOSITION/FOLLOWUP: He was given a follow-up appointments in the Infectious Disease Clinic, as well as with Dr. Rives.

/s/ Roberta Rothen, M.D.
Roberta Rothen, M.D.
PMD III

/s/ Illegible

DD: 12-19-92 DT: 12-19-92
RR/mt029 – D1312202.029/37865/VMT: 052

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
Programs (LOGO)

Instructions On Reverse

OMB No. 1215-0160

1. OWCP No. 92391
2. Carrier's No.
3. Name of person making claim (Type or print)

First Middle Initial Last

Gil HOEFLICH

4. Date of Injury (Mo./day/yr.)
   9-9-92
5. Claimant's address (number, street, city, state, Zip code)
   2499 Dorking Place
   Santa Barbara, CA 93105
6. Marital Status
7. Sex
   [x] Male [ ] Female
8. Age or date of birth (Mo./day/yr.)
   3-1-57
9. Social Security Number (Not required by law)
   217-74-2194
10. Did injury cause loss of time beyond day or shift of accident?
    [x] Yes [ ] No
11. On date of Injury give
    a. Hour began work
       [ ] AM [x] PM
       12:52

b. Hour of accident
[ ] AM [x] PM
1:48

c. Did you stop work immediately?
[x] Yes [ ] No

12. Date and hour pay stopped?
[ ] AM [x] PM
9-9-92 5:55

13. Date and hour you returned to work
Claimant remains totally disabled

14. Occupation (Job title; longshore worker, welder, etc.)
commercial diver

15. Injured while doing regular work?
[x] Yes [ ] No
(If "No," explain in Item 24)

16. Wages or earnings when injured (include overtime allowances, etc.)
a. Weekly
$2,000

b. Total earnings during year immediately before injury.
$92,000

17. Has 3rd party or other claim been made because of this injury?
[x] Yes [ ] No

18. Number of years you worked for this employer
5

19. Number of days usually worked per week
5-7

20. Name of supervisor at time of accident?
Ed Thomas

21. Earliest date supervisor or employer knew of accident
9/9/92

22. Were you employed elsewhere during the week injured?
[x] No [ ] Yes (If "Yes," state where and when on reverse.)

23. Exact place where accident occurred (Street address, city, town, name of vessel, pier, terminal, etc.)

Inside submarine sewer outfall off Point Loma, California.

24. Describe in full how the accident occurred (Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on reverse.)

Claimant was struck in foot with 10,000 psi water blaster during a dive.

25. Nature of injury (name part of body affected – fractured left leg, bruised right thumb, etc. If there was a loss or loss of use of a part of the body, describe.)

Severe water blasting injury to left foot and leg. Secondary local and systemic infections.

26. Have you received medical attention for this injury?
[x] Yes [ ] No
(If "Yes," give name and address of doctor, clinic, hospital, etc.)

The lead physician was Karen Rives, M.D. at UC San Diego Medical Center.

27. Were you treated by a physician of your choice?
[x] Yes [ ] No

28. Was such treatment provided by employer?
[x] Yes [ ] No

29. Are you still disabled on account of this injury?
[x] Yes [ ] No

30. Have you worked during the period of disability?
[ ] Yes [x] No

31. Have you received any wages since becoming disabled?
[ ] Yes [x] No (If "Yes," give dates on reverse)

32. Has injury resulted in permanent disability, amputation or serious disfigurement?
[x] Yes (Describe on reverse.) [ ] No

33. Name of employer (Individual or firm name)
Martech International

34. Nature of employer's business
Commercial Dive Contractor

35. Address of employer (Number, street, city, state, Zip code)
3401 West Fifth Street, Suite 150
Oxnard, CA 93030

36. If accident occurred outside the U.S., state whether you are a U.S. Citizen
[ ] Yes [ ] No

37. I hereby make claim for compensation benefits, monetary and medical, under the Longshore & Harbor Workers' Compensation Act

Signature of claimant
or person acting in his/her
behalf /s/ John R. Gilmore

38. Date of this claim
(Mo./day/yr.)
August 24, 1993

Section 31(a)(1) of the Longshore Act, 33 U.S.C. 931(a)(1) provides, as follows. Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

Pre-Hearing Statement
Longshore and Harbor Workers' Compensation

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
Programs (LOGO)

This form is required by regulation (20 CFR 702.317). Failure to return this form at the required time can cause delay in preparation of the case for formal hearing.

OMB No. 1215-0085

1. Employee's name (Last, first, middle)
   Hoeflich, Gil

OWCP No. 13-92391

Carrier No. 345C-364244-1

2. Name, address and phone number of party on whose behalf this form is submitted:

   CIGNA Property & Casualty Companies
   P.O. Box 2228
   Chatsworth, CA 91313-2228
   Telephone No. (818) 701-3500

3. Name, address and phone number of party's representative:

   Roger A. Levy
   Laughlin, Falbo, Levy & Moresi
   Two Embarcadero Center, 5th Floor
   San Francisco, CA 94111-3823
   Telephone No. (415) 239-5594

4. Briefly state the facts of the claim:

   Mr. Hoeflich claims benefits under the LHWCA on the basis of an injury while working as a diver for employer Martech International.

5. State the issues on which the parties have reached agreement:

   None.

6. State the issues you will present for resolution at formal hearing:

   - Crewmember exclusion under Section 2(3)(G) of the LHWCA

   - All other issues deferred

7. List the names of witnesses who will testify in person on your behalf at formal hearing. Also list reports that are to be submitted in lieu of live testimony:

   Witnesses will be disclosed in the course of discovery.

8. List all exhibits, other than reports listed in item 7 above, you intend to submit at the formal hearing. (Use separate sheet or sheets if necessary). If you want the deputy commissioner to send the exhibits to the Office of Administrative Law Judges, you must submit them with this form:

   - Procedural documents filed before the OWCP

   - All other documents identified in the course of discovery will be disclosed in accordance with the court's Pre-Trial Order.

9. Estimate total hours needed for your witnesses to testify:

   2 hours

10. If an interpreter is required, state language:

    N/A

11. Indicate the city of your preference or formal hearing:

San Francisco

Note: Any other matters pertinent to scheduling should be explained on a separate sheet attached to this form.

12. Type or print name of person completing form:

Roger A. Levy
Laughlin, Falbo, Levy & Moresi

13. Signature of person completing form:

/s/ Roger A. Levy

14. Date (Mo., day, year):

11/15/93

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION
PROGRAMS LONGSHORE AND
HARBOR WORKERS' COMPENSATION

NOTICE OF CONTROVERSION OF RIGHT TO COMPENSATION

This report is authorized by law and regulation (33 USC 914(d), (e); 20 CFR 702.233). Failure to report when controverting right to compensation can result in liability for 10 per cent additional compensation.

INSTRUCTIONS: This form may be used by the employer/carrier to controvert the right to compensation. 33 USC § 914(A) requires the employer to pay compensation promptly and without an award unless the right to such compensation is controverted by the filing of this form. Failure either to pay each installment of compensation, or controvert the right to such compensation, within fourteen days after it becomes due may result in liability for additional compensation equal to ten percent of each installment not paid when due. 33 USC § 914(d), (e). If the right to compensation is controverted, this form should be submitted in triplicate to the Deputy Commissioner, and the reasons for such controversion should be fully stated in item 12. All prior issues of Forms LS-207 are obsolete and should not be used.

1. OWCP File No. ~~18-55456~~ 13-92391
2. Employer File No.
3. Carrier File No. 345C 364244-1

4. Claimant's Name and Address

   GIL HOEFLICH
   2499 DORKING PLACE
   SANTA BARBARA, CA 93105

5. Claim File or Injury Reported Under (*check one*)

   [ ] LHWCA [ ] NFIA

   [ ] DCWCA

   [ ] DBA

   [ ] OCS

6. Employee's Name and Address – *If different from Claimant's*

   N/A

7. Employer's Name and Address

   MARTECH INTERNATIONAL
   3401 W. FIFTH ST., #150
   OXNARD, CA 93030

8. Carrier's Name and Address

   CIGNA
   P. O. BOX 2228
   CHATSWORTH, CA 91313

9. Nature of Injury or Occupational Disease

   INJURY TO LEFT LEG & FOOT.

10. Date of Injury (*Month, Day, Year*)

    9-9-92

11. Date of Employer's First Knowledge of Injury (*Month, Day, Year*)

    8-24-93

12. Right to compensation is controverted for the following reason(s)

    CLAIMANT WORKS AS A COMMERCIAL DIVER. CLAIMANT WAS IN WATERS/SUBMARINE WHEN INJURY OCCURRED. CLAIMANT WAS INSIDE SUBMARINE SEWER OUTFALL OFF POINT LOMA, CA.

    CLAIMANT SHOULD FILL [sic] FOR BENEFITS UNDER THE JONES ACT.

13. Authorized Signature

14. Title

    CLAIMS REPRESENTATIVE

15. Date of this Notice
    (*Month, Day, Year*)

    9-28-93

16. (**OWCP USE**) A copy of the form was mailed to the claimant and/or representative on ___. Initials ___.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

GIL HOEFLICH, Plaintiff/Appellant, v. MARTECH USA INC., et al., Defendants/Respondents.	Consolidated Case Nos. AO69336 and AO72913 DECLARATION OF VICTOR TACCONELLI, M.D.

DECLARATION

I, Victor Tacconelli, hereby state and declare that:

1. I am an orthopedic surgeon licensed to practice medicine in California since 1973 and board certified in orthopedic surgery since 1982.

2. I am a member of the Santa Barbara County Medical Society, the American Academy of Orthopedic Surgeons, and the American Academy of Orthopedic Sports Medicine, and practice medicine, with a specialization in orthopedic surgery, in Santa Barbara, California.

3. I became Gil Hoeflich's treating orthopedist in June 1993. On October 26, 1993, following an extensive examination, I determined that Gil has a disability resulting in limitation to semi-sedentary work and would require orthotic inserts in his shoes and sole adjustments on his shoes for life. The last time I examined Gil was February 7, 1994.

4. I have been provided recent photographs of the shoes and orthotic inserts Gil Hoeflich currently wears. I have also been informed that these inserts were prepared in February 1994 based on foot molds obtained in October 1993.

5. Gil personally advises me that he has had no orthopedic evaluation since December 1994, that the shape of his feet appears to be changing, and that he is experiencing soreness or pain, depending on the level of activity, in his lower back and the uninjured right lower extremity.

6. It is my professional opinion that Gil's condition will continue to deteriorate unless he obtains immediate orthopedic evaluation and updated orthotics based on current molds.

I have reviewed the foregoing Declaration and can confirm under penalty of perjury that the facts and opinions contained therein are true and correct, and personally known to me, and that if I were called as a witness herein, I could competently so testify under oath.

Executed this 29th day of March, 1996 in the City and County of Santa Barbara, State of California.

3-29-96
Date

/s/ Victor Tacconelli, M.D.
Victor Tacconelli, M.D.

LANE
POWELL
SPEARS
LUBERSKY

(Letterhead Omitted In Printing)

October 13, 1995

John R. Hillsman, Esq.
McGuinn, Hillsman & Palefsky
535 Pacific Ave
San Francisco, Ca. 94133

Re: Hoeflich v. Martech
Our File No.: 52020.001

Dear John:

With regard to the recent request from Colleen Miller of your office requesting that we pay additional medical and foot wear expenses for Mr. Hoeflich, please note that there is a judgment of the Superior Court determining that Mr. Hoeflich is not a Jones Act seaman. Accordingly, neither Martech U.S.A., Inc., nor its Jones Act carrier have an obligation to pay cure.

We were appointed Martech's counsel for purposes of the Superior Court action, and do not represent Martech for purposes of Mr. Hoeflich's L&H claim against Martech. We refer you to CIGNA, Martech's L&H carrier.

Please contact the undersigned if you have any questions concerning this letter.

GJK:ahw

Sincerely,

LANE POWELL SPEARS
LUBERSKY

/s/ George J. Koelzer
GEORGE J. KOELZER

Law Offices of
LAUGHLIN
FALBO
LEVY &
MORESI

A Partnership Including Professional Corporations

(Letterhead Omitted In Printing)

April 1, 1996

TWO EMBARCADERO CENTER
5TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-3823
TELEPHONE (415) 781-6676
FACSIMILE (415) 781-6823

John R. Hillsman, Esq.
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133

Re: Hoeflich v. Martech
LFLM File : 213-95546

Dear Mr. Hillsman:

We have reviewed the request for medical benefits set forth in your letter of March 22, 1996. At this time and for the reasons set forth below, we must decline your request for medical benefits for Mr. Hoeflich.

As you know, our client, CIGNA, provided LHWCA coverage to Martech. Various London Underwriters subscribing to Martech's Marine Employer's Liability policy (hereinafter "London Underwriters") provided "Jones Act" and associated vessel related employee personal injury coverages to Martech. Shortly after Mr. Hoeflich's

accident, Martech and London Underwriters determined that he would be paid maintenance and cure, benefits traditionally reserved for injured crew. In fact, Martech didn't even notify CIGNA that Mr. Hoeflich had been injured. No demand was made for LHWCA benefits until Mr. Hoeflich filed a longshore claim after Martech and London Underwriters unaccountably terminated his maintenance benefits. (We note, parenthetically, that, after terminating maintenance, Martech and London Underwriters continued to provide "cure". It had heretofore been our experience that such benefits always run hand-in-hand.) Understandably, in light of this history, CIGNA denied liability, as "master and agreed with London Underwriters' early positive determination of Jones Act status.

Subsequently, Mr. Hoeflich commenced an action against Martech, seeking the various remedies available to seamen, including those of maintenance and cure. Ultimately, a unanimous jury determined that Mr. Hoeflich was a member of the crew of ARCTIC CAROLYN, and therefore eligible for, among other things, maintenance and cure. The jury confirmed London Underwriters' early determination in this matter. London Underwriters' subsequent reversal of their field has caused the present problem. CIGNA, on the other hand, continues to maintain the position that it took at the outset of this claim, that Mr. Hoeflich is not eligible for benefits under the LHWCA. Accordingly, we must deny your request for medical benefits.

We recognize that this matter has been somewhat complicated by the Martech/London Underwriters reversal of position. However, we question the extent to which such

change is attributal to Martech. Were Martech still a going concern, and not at the end of a Chapter 7 liquidation, we suspect that maintenance and cure would be forthcoming. However, Martech's inconsistent treatment of its injured employees must remain a matter for speculation. As we both know, the current Martech, its Trustee in Bankruptcy, has formally declared that it has no interest in the outcome of Mr. Hoeflich's case.

Please do not hesitate to contact us should you have any further questions in this regard.

Very truly yours,

LAUGHLIN, FALBO,
LEVY & MORESI

By: /s/ Roger A. Levey
Roger A. Levy

cc:

George L. Koelzer, Esq.
LANE POWELL SPEARS LUBERSKY
333 South Hope Street, Suite 2400
Los Angeles, CA 90071

MOTION FILED
FEB 13 1997

(3)

No. 96-1112

In The

Supreme Court of the United States

October Term, 1996

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District

MOTION FOR LEAVE TO FILE, AND BRIEF OF INSURANCE COMPANY OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

J. MARK FOLEY
Counsel of Record

LAUGHLIN, FALBO, LEVY & MORESI
Two Embarcadero Center,
Fifth Floor
San Francisco, CA 94111
(415) 781-6676
Counsel for Amicus Curiae
Insurance Company
of North America

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

MOTION FOR LEAVE TO FILE BRIEF OF INSURANCE COMPANY OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Insurance Company of North America respectfully moves for leave to file the attached brief *Amicus Curiae*. The consent of Respondent has been obtained. The consent of Petitioner has not been obtained.

Insurance Company of North America has a direct interest in this case. It underwrites the insurance for liability of the employer under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (LHWCA). Liability for the injuries suffered by Gil Hoeflich rests either with Petitioner Martech as vessel owner and Jones Act employer through its Jones Act insurers, or with employer Martech through its LHWCA insurer, these *amicus curiae*.[1]

In addition, Insurance Company of North America is a major underwriter of employee injury risks under California law, under the LHWCA, and under the maritime laws. In that capacity it has an interest in rules of law establishing Jones Act status that are as clear and easy to administer as possible. The rules sought by petitioner would add confusion and difficulty of administration to this already difficult area of law. This would be to the

---

[1] Insurance Company of North America has not accepted liability under the LHWCA, and no order has issued in that forum. However, it made two $10,000 payments to Mr. Hoeflich, on the understanding that those payments would either be credited against liability under the LHWCA, if the employee were found not to be a seaman, or would be a lien upon the Jones Act recovery, if the jury found him to be a seaman.

detriment of these *amicus curiae* and the multitude of employers it insures.

Amicus curiae for these two reasons request leave to file the attached brief objecting to the Petition for a Writ of Certiorari.

Respectfully submitted,

J. MARK FOLEY
Counsel of Record
LAUGHLIN, FALBO, LEVY & MORESI
Two Embarcadero Center,
Fifth Floor
San Francisco, CA 94111-3823
(415) 781-6676
Counsel for Amicus Curiae

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BRIEF OF INSURANCE COMPANY OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The interests of the *amicus curiae* are set forth in the Motion accompanying this brief.

STATEMENT OF THE CASE

Amicus curiae adopt the Counter Statement of the Case submitted by Respondent.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE ISSUE IT ADDRESSES HAS ALREADY BEEN DECIDED BY THIS COURT

Petitioner seeks review of an unpublished, mid level state appellate court decision that affirmed a jury finding of seaman status. That state decision does not conflict with any decision of this Court, nor with decisions of the federal appellate courts. It does not present an urgent or important question that warrants this Court's review.

Petitioner seeks a rule for establishing seaman status that looks backward in time; that is based primarily upon a statistical analysis of work done in the past.

Amicus curiae argue that when the assignment changes the status changes. The nature of the new assignment determines seaman status. If the nature and duration of the new assignment is such that it alone qualifies an employee for seaman status, then it matters not whether an injury occurs on the first or the last day of that new assignment.

This court recently set forth very clear and functional guidance.

> [W]e see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well.[2]

There is no good reason to revisit that issue. There are several good reasons not to do so.

The result sought by Petitioner would lead to incongruous results, difficulty of administration, and frustration of the Jones Act's purpose. (a) Looking only backward in time, similarly situated employees hired at different times or from different sources, but injured in the same accident while doing the same work would be treated differently. (b) Ignoring the anticipated duration of a current assignment would create difficulty of administration. It would require this Court to set a standard for determining how far into a project or a voyage is far enough to establish seaman status. (c) Employees such as

---

[2] *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172, 2191 (1995).

Mr. Hoeflich would be denied the benefits of the Jones Act at a time when risk of injury is greatest, at the beginning of a project.

Petitioner also contends a Writ should be granted because this case somehow relates to the *Papai*[3] case, which is currently pending at the Court. There is no similarity between the two cases. *Papai* asks if an administrative decision under the Longshore and Harbor Worker's Compensation Act estops a subsequent Jones Act trial on seaman status. Here, not only has there been no Longshore determination or order, but no initial notice. Neither Martech nor Mr. Hoeflich reported the injury to the LHWCA insurer. Only after the Jones Act insurer stopped payment was the LHWCA insurer given notice. *Papai* also asks if the fleet seaman doctrine can be expanded beyond the fleet owned or controlled by the employer. That issue is not a factor in this case.

A. THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS TO ESTABLISH A RULE THAT WOULD TREAT SIMILARLY SITUATED EMPLOYEES DIFFERENTLY

Just prior to his injury, Mr. Hoeflich had been reassigned to a new project. In the past he had worked from shore or from piers as a deep sea diver. Those assignments did not qualify him as a seaman, because he was not then associated with a vessel. However his new assignment did associate him with the vessel ARCTIC CAROLYN. The jury in this case found that assignment

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[3] *Harbor Tug & Barge v. Papai*, 95-1621.

qualified Mr. Hoeflich as a seaman. Petitioner contends the jury finding was in error because, at the time of the injury, Mr. Hoeflich had not yet been on the ARCTIC CAROLYN for a substantial period of time.

The Petition for Writ of Certiorari should be denied, because it asks the Court to establish a rule that would lead to incongruous and inequitable results.

For example, consider the possibility of two divers injured in the same accident, but with different work histories. If one had just been assigned to the project, as respondent had been in this case, but had previously worked in a non-seaman capacity, while the other diver had worked as a seaman in the past, should they be now treated differently? Applying the result sought by Petitioner would grant seaman's remedies to one but not the other, though both were doing exactly the same work at exactly the same time for exactly the same employer under exactly the same conditions. It would be bad public policy to have a rule that would allow such an incongruous result.

B. THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS A RULE THAT WOULD BE EXTREMELY DIFFICULT TO ADMINISTER AND WOULD CREATE UNNECESSARY INCONGRUITIES

Problems of administration would occur with any likely rule promulgated in response to the Petition for Writ of Certiorari. Again, the guidelines in *Chandris* are workable, and afford ease of administration. But if it is necessary to consider how long an employee has been on a present assignment before granting him seaman status,

the question immediately rises, how long is long enough? Is 30 days a reasonable length of time? Many traditional voyages in modern ships don't last 30 days. A sailor who signs on for a round trip Liverpool-New York voyage may well not qualify as a seaman, though he performs traditional seaman's duties on a vessel in navigation on the high seas. Is duration to be measured by a proportion of the voyage or project completed? What happens if the voyage lasts longer than anticipated or the project runs into delays and goes longer than expected? That would create the untenable situation where an employee might be considered a seaman at the time of injury, but in retrospect be determined not to be a seaman because he was injured too early as a percentage of the voyage or project.

The same problem exists with comparing an employee's length of time on the current project with his overall work history. An employee newly hired with no prior work history can claim 100 percent of his career is as a seaman. But a fellow employee, in Mr. Hoeflich's circumstance, could only claim a small percentage of his entire work history worked as a seaman. Again, this presents the incongruous result of two employees doing exactly the same thing for the same pay on the same project injured perhaps in the same accident, and treated differently.

In addition, if past work history determines status, there is an incentive for employers to hire those without seaman experience in order to avoid Jones Act liability. Such discrimination may not be illegal, but would certainly be bad public policy. These *amicus* contend it

would not be good policy to have a rule of law which would encourage such discrimination.

C. THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS A RULE THAT WOULD FRUSTRATE THE PURPOSE OF THE JONES ACT

Those who go down to the sea in ships are exposed to certain perils that their shore-bound brethren avoid. A considerable body of maritime law, including very generous remedies, have been developed in view of these special perils. Nowhere is this truer than among those who dive deep below the sea's surface.

Petitioner seeks a rule for establishing seaman status that requires a duration of work prior to the injury in order to qualify as a seaman. But common sense suggests that the greatest danger to deep sea divers occur early in a project rather than later. The sub-surface strata is as yet unknown. The under sea work has not yet fallen into a routine. The crew of the vessel has not yet coalesced into a smoothly operating team. Therefore injuries are at least as likely and perhaps more likely to occur earlier than later in a project. Yet petitioner's request would cut off those first few days, when the more generous remedies available to a seaman are most in need.

This incongruity like those two stated above make it inappropriate to grant the Writ for Certiorari.

CONCLUSION

There is no conflict among the circuits, no conflict with this Court's decisions, and no important federal question in need of resolution to justify review of the unpublished appellate court decision in this matter.

This court has set forth a good and functional guideline for determining when seaman status is achieved. Status changes when the assignment changes. There is no good reason to revisit that issue. There are several good reasons not to do so. Any rule other than that set forth in *Chandris* would lead to inequitable treatment of similarly situated employees, would lead to difficulty of administration, and would deny seaman's remedies to some seaman most in need of them. For all these reasons *amicus curiae* request that the Petition for Writ of Certiorari be denied.

Dated: February 13, 1997

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 24 1997
CLERK

No. 96-1112

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

PETITIONER'S REPLY BRIEF

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IN THE

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Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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PETITIONER'S REPLY BRIEF

INTRODUCTION

This case, like *Papai v. Harbor Tug & Barge Company*, 67 F.3d 203 (9th Cir. 1995), *cert. granted*, *Harbor Tug & Barge Company v. Papai*, — U.S. — , 117 S. Ct. 36 (1996),[1] involves the scope of employment which

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[1] Argued before the Court on January 13, 1997, and decision pending.

must be considered in determining seaman status under the Jones Act, 46 U.S.C. App. § 688. The seaman status question in *Papai* concerns whether assignments with prior employers should be considered. The seaman status question in this case presents three choices as to the scope of employment which should be considered: assignment at the time of injury (as Respondent contended at trial and in the Court of Appeal); all assignments during the course of Respondent's employment with Petitioner (as Petitioner has consistently contended); or assignments at the time of injury together with future assignments (as the Court of Appeal held and as Respondent now contends in this Court). Together *Papai*, which involves past assignments with prior employers, and this case, which involves future assignments, complete the range of employment issues which must be considered to define Jones Act seaman status.

SEAMAN STATUS IN THIS COURT

In recent years, the Court has several times defined Jones Act seaman status. For example, in *Chandris, Inc. v. Latsis*, — U.S. — , 115 S. Ct. 2172 (1995), this Court held that seaman status requires a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. In *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), this Court held that seaman status requires that an employee contribute to the mission of a vessel in navigation. The relationship to a vessel in navigation is central to seaman status. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946). This Court has defined the term vessel for purposes of the Jones Act. *Senko v. La Crosse Dredging Corporation*, 352 U.S. 370 (1957); *Desper v. Starved Rock Ferry Company*, 342 U.S. 187 (1952).

Other elements of a Jones Act cause of action have also been determined by this Court. *See, e.g., Braen v. Pfeiffer Oil Transportation Company*, 361 U.S. 129 (1959) (a seaman must be injured in the course of his employment). The relationship between the Jones Act and the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, has been addressed by this Court. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Tipton v. Socony Mobil Oil Company, Inc.*, 375 U.S. 34 (1963).

What remains undecided by this Court, even after *Papai* is decided later this Term, is the scope of employment that must be considered in determining the substantial connection requirement of seaman status. Petitioner respectfully suggests that this Court grant the Petition and reserve decision in *Papai* until this case may be heard. This would allow the Court to complete its definition of seaman status so that employers do not need to carry duplicative insurance, employees do not need to file duplicative claims, courts and the administrative fora can determine their respective jurisdictions, and, of great importance, federal and state courts are not burdened by inappropriate Jones Act cases.

THE RECORD IS DETAILED

The record contains very detailed evidence of Respondent's assignments during the course of his employment with Petitioner. For example, Exhibits E-1 and E-2, in Appendix to Petition, at 25a, 26a, show that Respondent, during the course of his employment with Petitioner, dived from the shore and from beaches, non-self-propelled barges (nonvessels), fixed platforms not owned or operated by Petitioner, dams, a surfboard, a truck, a vehicle

with balloon tires, an effluent outfall, and vessels not owned or operated by Petitioner. Respondent's own testimony shows that less than 25 percent of his overall dive activities in California for Petitioner were from vessels owned or operated by Petitioner, CT 165, in Appendix to Petition, at 38a. This testimony alone compels the conclusion that Respondent is not a seaman. *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S. Ct. 2172, 2191 (1995) (approving the Fifth Circuit's "rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act"). Respondent's own testimony was that "[t]he great majority" of his diving work on the West Coast for Petitioner was not from vessels owned or operated by Petitioner, and that most of his dives for Petitioner were not from Petitioner's vessels. RT 951 in Appendix to Petition, at 34a. The testimony of Mr. Thomas, Petitioner's diving supervisor, shows that the only connection Respondent ever had with the ARCTIC CAROLYN was the assignment on the date of injury, Appendix to Petition, at 33a. Thus, the record in this case affords more than an adequate basis for choosing among the proffered rules.

RESPONDENT IN THIS COURT URGES A DIFFERENT RULE FROM THE RULE HE URGED IN THE TRIAL COURT AND IN THE COURT OF APPEAL—THE VOYAGE TEST

To vividly illustrate the present uncertainty in respect of employment issues as to Jones Act seaman status, it is useful to examine Respondent's positions in the course of this action. Respondent, in this Court—for the first time—argues that the assignments relevant to his seaman status are his assignments at the time of injury together with

the future assignments he expected. Opposition Brief, at i, 3, 5, 15, 19-20. For example, Respondent now states:

> Hoeflich has insisted all along [*sic*] that his seaman status should sink or swim on the basis of his year-long reassignment as Martech's lead diver off Point Loma.

Opposition Brief, at 5. That is not the basis on which Respondent tried this case. Respondent tried this case on the theory that the relevant assignment was solely the assignment at the time of injury:

> Mr. Hillsman [Respondent's counsel]: In my view, the cutoff is the plaintiff's assignment at the time of the accident. In this circumstance we take the position a Jones Act seaman's status sinks or swims with assignment at the time of the accident.
>
> . . . [T]he rule is that . . . a seaman's status is determined solely from assignment at the time of the injury.

RT 934-35, in Appendix to Petition, at 33a.

If this were a correct statement of the relevant employment, all maritime employees injured on vessels would be seamen, a circumstance which some of the bar would welcome, but which would greatly burden the federal and state courts hearing these actions. This test, known as the "voyage test," was expressly rejected by the Court in *Latsis*:

> [W]e must reject the initial appeal of . . . a 'voyage' test and undertake the more difficult task of developing a status-based standard.

Latsis, —— U.S. —— , 115 S. Ct. at 2185.

The voyage rule would also make unnecessary the accepted analysis of the proportion that vessel-related assignments are of all assignments. That is, if the voyage rule were adopted, there would be no need to apply the 30 percent rule (the proportion of vessel-related assignments to all assignments), *Chandris, Inc. v. Latsis*, —— U.S. —— , 115 S. Ct. 2172, 2191 (1995), because vessel-related assignments would be 100 percent of the relevant assignments.

Respondent, recognizing that he tried this case on the basis of a rule rejected by the Court in *Latsis*, now argues for a different rule: that the relevant employment is Respondent's assignment at the time of injury together with his future assignments. Respondent characterizes this combination of present and future assignments as a present "year-long . . . assignment." *See, e.g.*, Opposition Brief, at i, 5, 15, 20. As shown below, the record shows this was neither a present assignment nor a one-year assignment to a vessel in navigation or to a fleet of vessels in navigation. Thus, it becomes clear that the Court should now resolve the only remaining area of uncertainty in Jones Act seaman status—that is, the effect (if any) of projected future seaman employment—after its rulings in *Latsis*, *Papai*, and *Wilander*.

THE FUTURE ASSIGNMENTS WHICH RESPONDENT MIGHT HAVE EXPECTED CANNOT BE CONSIDERED A "PRESENT" ASSIGNMENT

Even if Respondent's future assignments could be considered in determining seaman status, the record shows that those assignments were not "present" assignments. They did not exist in the present, and might or might not have come into existence in the future. For example, the expertise for which Respondent was hired by Petitioner, in particular his expertise in driving a submersible, became unnecessary when it was decided not to lay pipe with a submersible. RT 951-52, in Appendix to Reply, at 7a-8a. Respondent's employment with Petitioner was also at will, and could have been terminated. RT 259-60, 410-11, in Appendix to Reply, at 2a-3a, 4a. This illustrates the uncertainty of basing seaman status on possible future assignments: they might, or might not, occur. This further illustrates the ease and facility with which Jones Act seaman status could be infinitely expanded by ambitious suitors—despite the Court's rulings in *Latsis*, *Papai* and *Wilander*.

PLAINTIFF'S FUTURE ASSIGNMENTS, EVEN IF THEY MAY BE CONSIDERED, WERE NOT ASSIGNMENTS TO VESSELS IN NAVIGATION THAT WOULD HAVE BEEN SUBSTANTIAL IN TERMS OF THEIR DURATION AND NATURE

Even if the future had been as Respondent expected, the future assignments which Respondent expected would not have been assignments to vessels in navigation. The record fails to support the vessel status of the craft from which Respondent claims he would have dived in the future: this is unsurprising, given that Respondent tried his case on the

theory that only the assignment at the time of injury matters.

The record nevertheless shows that the craft to which Respondent claims he would have been assigned were not Jones Act vessels. Respondent claims he would have been assigned to the HAAKON and the BETTY L, Opposition Brief, at 8, and that those craft constituted an "identifiable fleet," *id.* at 3. It is hard to have an "identifiable fleet" when the craft of that fleet have different owners. The ARCTIC CAROLYN was owned by Petitioner. RT 438, in Appendix to Petition, at 29a. The HAAKON was owned by defendant Manson Construction and Engineering Company ("Manson"). RT 118, 953, in Appendix to Reply Brief, at 2a, 8a. The BETTY L was owned by defendant Morrison Knudson Corporation ("MK") and bareboat chartered to defendant Point Loma Constructors, a joint venture between Manson and MK. RT 118-19, in Appendix to Reply Brief, at 2a.

The HAAKON and the BETTY L are not Jones Act vessels for another reason: they are not vessels *in navigation*. They lacked a crew and an independent means of propulsion. RT 885-86, 889, 896-97, in Appendix to Reply Brief, at 5a, 6a. The Coast Guard prohibited the BETTY L from carrying any persons during transits, and permitted the HAAKON to have personnel aboard only when it was moored on station. Exhibits 44 and 42, in Appendix to Reply Brief, at 9a-11a, 12a-13a. It is hard to be a crewmember of a craft without a crew. It is hard to have a transportation function, *Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990), when there is no power or authority to transport.

Thus, even if Respondent's future assignments could be considered on the issue of seaman status, those future

assignments would no more be assignments to Jones Act vessels than would Respondent's assignments to beaches, dams, and surfboards.

RESPONDENT'S BASIC ASSIGNMENT DID NOT CHANGE

Respondent avoids consideration of his past assignments by arguing that his "basic assignment," *Latsis*, 115 S. Ct. at 2191, changed. Opposition Brief, at 2, 14, 19. Respondent's "basic assignment" remained unchanged throughout his employment with Petitioner: he was a diver. Exhibits E-1 and E-2, in Appendix to Petition at 25a, 26a, show that diving is what Respondent did between 1987 and 1992. Respondent himself testified that 95 percent of his employment with Petitioner was employment as a diver. RT 263, lines 13-25, in Appendix to Reply Brief, at 3a. He dived in different locations and from different platforms, but diving was consistently his assignment. An assignment does not change when its location changes: if it did, past assignments could never be considered in determining seaman status.

The rule of law urged by Respondent is erroneous. Also erroneous is Respondent's procrustean attempt to make the facts fit his erroneous law. The law as to employment, present and future, in establishing Jones Act seaman status needs to be resolved, to complete the Court's several efforts to define Jones Act seaman status.

THE PETITION SEEKS REVIEW OF A FINAL JUDGMENT

Petitioner seeks review of the decision of the Court of Appeal in an appeal taken from the final judgment in

Petitioner's favor, the final judgment entered on the order granting Petitioner's motion for judgment notwithstanding the verdict. Final Judgment, in Appendix to Petition, at 13a. The "Judgment on Special Verdict" in Respondent's favor was not the judgment reversed by the Court of Appeal, is not the judgment that is the subject of the Petition, and was ruled final on February 11, 1997.[2]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its Petition be granted.

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February 24, 1997

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[2] Respondent is mistaken in other respects, Opposition Brief, at 5, 6, 9-10, 18, 20. The record is clear that $290,766.28 has been paid by or on behalf of Petitioner to Respondent, $252,211.75 of that amount after service of the complaint. Exhibit G, Appendix to Reply Brief, at 14a-20a. *Amicus curiae*, in its Brief in Support of Respondent, at 1 n.1, states that Petitioner's LHWCA carrier paid Respondent $20,000. (Petitioner objects to the representation of INA by the same counsel, Laughlin, Falbo, Levy & Moresi, which INA appointed to represent Petitioner in Respondent's LHWCA proceeding, and to its taking a position adverse to the interest of Petitioner, its former client.)

APPENDIX

APPENDIX

[Excerpts From Reporter's Transcripts of Proceedings
Volumes I, II, III, V, VI]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

BEFORE THE HON. WINSLOW CHRISTIAN,
ASSIGNED

No. 950673

GIL HOEFLICH,

Plaintiff,

vs.

MARTECH INTERNATIONAL, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME I

December 12, 1994

* * * *

[118] [Q] MR. HILLSMAN: The BETTY L was owned by whom, sir?

[A] [TIMOTHY ARTHUR HANSON, SUPERINTENDENT FOR MANSON CONSTRUCTION:] I believe Morrison-Knudsen.

[Q] The Artic Carolyn was owned by Martech?

[A] Best of my knowledge.

[Q] THE HAAKON by Manson?

[A] Yes.

[Q] THE BETTY L. by M.K.?

[A] Yes.

* * * *

VOLUME II

December 13, 1994

* * * *

[259] Q. [MR. HILLSMAN:] And did you remain steadily employed with Martech throughout your employment with Martech throughout your employment in the dive industry, or did you work for other employers?

A. [PLAINTIFF] In the Gulf of Mexico, primarily Martech. When I came out to California it was, I'd have to say, around 99 percent Martech.

Q. When did you come to California?

A. I believe that was in '85. Around there.

Q. And when you worked for Martech, what types of work did you do for them? What were your jobs with Martech?

A. Both in the Gulf and in California?

Q. Let's talk about California. For example, did you ever work in the shop?

A. Yes. Loading out jobs, working on some of their equipment.

Q. You were present when John Sabo testified?

A. Yes.

Q. He told us that he worked for Martech as a diver/mechanic.

A. Yes.

Q. You recall that he indicated he worked steadily for the company in the shop between dive jobs. Was that your experience?

A. No.

Q. Did you remain steady for Martech on a [260] 52-week year, or did you work on a project-by-project basis?

A. Basically job to job, wherever they have a job. Sometimes they need help here and there loading out jobs. I worked in the shop on that.

* * * *

[263] Q. [MR. HILLSMAN:] What fraction or percentage of your overall work for Martech involved supervision, where you did not go in the water, where you supervised the job topside as a pure diving supervisor?

A.[PLAINTIFF] Never getting in the water on the job?

Q. Correct.

A. Very little.

Q. Five percent? 10 percent? 15 percent?

A. Five percent, something like that.

Q. The overwhelming majority of your work with Martech involved work where you labored on the bottom as a wet diver; is that correct, sir?

A. Yes.

* * * *

VOLUME III

December 14, 1994

* * * *

[410] Q. [MR. HILLSMAN:] Now, let's talk a minute on how Martech hired its divers. As general employer for the company, you were a permanent employee, were you not?

A. [TED ROCHE, VICE PRESIDENT, MARTECH, U.S.A., INC.:] That is correct.

Q. You stayed on, project in project out?

A. That is correct.

Q. Was that also true of your divers?

A. We had -- the divers were paid -- none were in salaried a position. They were paid the days and hours they worked.

Q. Basically, the divers were hired on a project-by-project basis; isn't that correct?

A. Yes.

[411] Q. Some divers like Gil were hired again and again, project after project?

A. Depending on his availability, correct.

Q. Between projects you didn't expect Gil to stand by and hold himself available for you; if he had an opportunity elsewhere, he could take it?

A. He did.

Q. That's what you meant when you said depending on availability?

A. That is correct.

* * * *

VOLUME V

December 19, 1994

* * * *

[885] [Q] [MR. HILLSMAN:] THE HAAKON, unlike the ARCTIC CAROLYN, is not equipped with an engine?

[A] [ED THOMAS, MARTECH DIVING SUPERVISOR:] No.

[Q] She is typically towed by tug?

[886] [A] Yes.

[Q] Once on site and she has her anchors in place, she can move back and forth on the anchors by means of winches; is that correct?

[A] Yes.

[Q] She has diesel-powered anchor winches?

[A] I believe so, yes.

[Q] Carries on her diesel fuel?

[A] Only in the equipment. I don't believe there is fuel storage tanks.

* * * *

[889] [Q] [MR. HILLSMAN:] You are aware that the Betty L was towed by sea from the Golden Gate all the way down to National City for this project?

[A] [ED THOMAS, MARTECH DIVING SUPERVISOR:] Yes.

* * * *

[896] [Q] [MR. KOELZER:] When THE HAAKON and the Betty L went to the job site, did they sail by themselves, or were they towed out?

[A] [ED THOMAS, MARTECH DIVING SUPERVISOR:] Towed out.

[Q] If they were to be moved from one place, from job site to job site, or a distance a mile or two or three, they couldn't do it by themselves?

[A] No.

[Q] They didn't have power?

[A] No.

[Q] Didn't have bunks or living quarters on board, did they?

[A] No. As I understand, we -- when we were not on anchor, we couldn't be on board.

[Q] You had to have a crew boat?

[A] Yes.

[Q] Nobody could remain or live on board, could they?

[A] I don't know that they could. I am not sure of the circumstances there. No one did.

MR. KOELZER: Were [*sic*] are those Coast Guard Certificates, your honor?

[Q] Take a look at the Coast Guard Certificates put in evidence for the Haakon and the Betty L. Have you ever seen a Coast Guard [897] Certificate before?

[A] I have seen them, yes.

[Q] Take a look at each. Tell me what it says about the crew on the Haakon and the crew on the

Betty L. What is the crew required by the Coast Guard on each of them? Is there any?

[A] Zero, zero.

[Q] Zero, zero, and zero. As a matter of fact, you could attest to the fact there was no permanent crew aboard either the Haakon or the Betty L; wouldn't you agree?

[A] That is correct.

* * * *

VOLUME VI
December 20, 1994

* * * *

[951] Q. [MR. KOELZER:] When you were first made aware of the Point Loma extension job, was it your understanding that a [952] submarine was going to be used to lay the extension pipe?

A.[PLAINTIFF:] Yes. That's what I was told.

Q. And it came to pass that the submarine was impractical, so they used what is called the horse from the Betty L; is that correct?

A. It could be.

Q. You don't recall.

A. No.

Q. Were you ever told that you would be working as a submarine pilot on the Point Loma job during the pre-dive meeting? Were you ever told that?

A. Not during a pre-dive meeting.

Q. Were you ever told anywhere you would be working as a submarine pilot on the Point Loma job?

A. Yes. When they were bidding the job.

Q. Pardon?

A. When they were bidding the job.

* * * *

[953] Q. [MR. KOELZER:] It is your understanding that the vessel Haakon was owned by Manson; is that correct?

A. [PLAINTIFF:] Yes.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CERTIFICATION DATE: 23APR92

EXPIRATION DATE: 23APR94

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL NAME	OFFICIAL NUMBER	CALL SIGN	SERVICE
BETTY L	D652734	WRB5942	INDUSTRIAL VESSEL

HOME PORT	HULL MATERIAL	HORSEPOWER	PROPULSION
PORTLAND, OR	STEEL		NONE

PLACE BUILT	DATE BUILT	GROSS TONS	NET TONS	DWT	LENGTH
PORTLAND OR	01JAN82	6103	6103		420.00

OWNER	OPERATOR
MORRISON KNUDSEN CO., INC. 1 MORRISON KNUDSEN PLAZA P.O. BOX 7808 BOISE, ID 83729	MORRISON KNUDSEN CO., INC. 1 MORRISON KNUDSEN PLAZA P.O. BOX 7808 BOISE, ID 83729

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL, INCLUDED IN WHICH THERE MUST BE 0 CERTIFICATED LIFEBOATMEN AND 0 CERTIFICATED TANKERMAN.

___MASTER	___ MASTER & 1ST CLASS PILOT	___ ABLE SEAMEN	___ CHIEF ENGINEER	___ FIREMEN-WATERTENDERS
___CHIEFMATE	___ _____ CLASS PILOT	___ ORDINARY SEAMEN	___ 1ST ASST. ENGINEER	___ OILERS
___2ND MATE	___ RADIO OFFICER(S)	___ DECKHANDS	___ 2ND ASST. ENGINEER	___ _____
___ _____MATES	___ _____OPERATOR(S)	___ _____	___ _____ENG'RS.	___ _____

IN ADDITION, THIS VESSEL MAY CARRY 0 PASSENGERS, 0 OTHER PERSONS IN CREW, 12 PERSONS IN ADDITION TO CREW, AND _____. TOTAL PERSONS ALLOWED: 12

E PERMITTED AND CONDITIONS OF OPERATION:

*** OCEANS ***

CERTIFICATED WITHOUT A NAVIGATION CREW. THE BARGE MAY CARRY CONSTRUCTION PERSONNEL WITH NO DUTIES CONNECTED WITH THE NAVIGATION OF THE BARGE. DURING TRANSITS NO PERSONNEL SHALL BE CARRIED ABOARD THE BARGE.

AN ATTENDING VESSEL MUST BE ALONGSIDE WHILE PERSONNEL ARE ABOARD THE BARGE. THE ATTENDING VESSEL MUST HAVE SUFFICIENT CAPACITY TO ACCOMODATE ALL PERSONS ABOARD THE BARGE.

A MAXIMUM OF 12 PERSONS MAY BE ABOARD DURING CONSTRUCTION OPERATIONS; ONE TYPE I PERSONAL FLOTATION DEVICE MUST BE CARRIED FOR EACH PERSON ABOARD THE BARGE.

THE BARGE WILL PROVIDE NO OVERNIGHT ACCOMODATIONS.

*** SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION ***

WITH THIS INSPECTION HAVING BEEN COMPLETED AT RIO VISTA, CALIFORNIA ON 23APR92, THIS VESSEL IS CERTIFIED BY THE OFFICER IN CHARGE, MARINE INSPECTION, SAN FRANCISCO BAY, TO BE IN ALL RESPECTS IN CONFORMITY WITH THE APPLICABLE VESSEL INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

PERIODIC REINSPECTIONS

DATE	ZONE	SIGNATURE
20APR93	SFCMS	

THIS CERTIFICATE ISSUED BY:

J.M. MACDONALD, CAPT, USCG
OFFICER IN CHARGE, MARINE INSPECTION

SAN FRANCISCO BAY
INSPECTION ZONE

DEPT. OF TRANSP., USCG, CG-841 (Rev. 3-85)
PREVIOUS EDITIONS ARE OBSOLETE

SN 7530-00-FO1-0370

PLC-R00586

9a

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

SHEET 2 OF 3

Certificate of Inspection

.TY L PAGE 2 CERTIFICATION DATE: 23APR92

--- HULL EXAMS ---

-EXAM TYPE-	-NEXT EXAM-	-LAST EXAM-	-PRIOR EXAM-
DRYDOCK	26MAY94	08JAN92	26MAY89
INTERNAL STRUCTURAL	26MAY94	08JAN92	26MAY89

--- STABILITY ---

LETTER APPROVAL DATE/ 23JUN92 OFFICE/ GMSC

--- INSPECTION STATUS ---

FUEL TANKS

-TANK IDENTIFICATION-	-DATE EXAMINED-
NO. 1 STBD	26MAY89

PRESSURE VESSELS

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	WINCH ROOM	23APR92	23APR94
AIR RECEIVER	GEN ROOM	23APR92	23APR94
AIR RECEIVER	GEN ROOM	23APR92	23APR94
AIR RECEIVER	CRANE HOUSE	23APR92	23APR94
AIR RECEIVER	GEN ROOM	23APR92	23APR94
AIR RECEIVER	WINCH ROOM	23APR92	23APR94

LIFESAVING

LIFEBOAT/RAFT IDENTIFICATION	SERVICED/ REFURBISHED	WEIGHT TEST	FALLS RENEWED
VIKING	17APR92		
SWITLIK	21APR92		

--- LIFESAVING EQUIPMENT ---

	NUMBER PERSONS			REQUIRED
TOTAL EQUIPMENT FOR		12	LIFE PRESERVERS(ADULT)...	12
LIFEBOATS(TOTAL).....			LIFE PRESERVERS(CHILD)...	
LIFEBOATS(PORT)*.....			RING BUOYS(TOTAL).....	2
LIFEBOATS(STARBD)*...			WITH LIGHTS*.....	2
MOTOR LIFEBOATS*.....			WITH LINE ATTACHED*....	2
LIFEBOATS W/RADIO*...			OTHER*.....	
RESCUE BOATS/PLATFORMS.			IMMERSION SUITS.....	12
INFLATABLE RAFTS.....	2	12	PORTABLE LIFEBOAT RADIOS.	
LIFE FLOATS/BUOYANT APP			EQUIPPED WITH EPIRB?.....	NO
WORKBOATS (NOT REQUIRED)			(* INCLUDED IN TOTALS)	

--- FIRE FIGHTING EQUIPMENT ---

TOTAL HOSE LENGTH/ 150 NUMBER OF FIRE AXES/ NUMBER OF FIRE PUMPS/ 2

FIRE EXTINGUISHERS - HAND PORTABLE AND SEMI-PORTABLE

A-II	1 B-I	9 B-II	B-III
B-IV	2 B-V	C-I	C-II

*** SEE NEXT PAGE PLEASE ***

10a

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Certificate of Inspection

.TY L CERTIFICATION DATE: 23APR92

--- CERTIFICATE AMENDMENTS ---

1. PORT AMENDING/ SFCMS DATE AMENDED/ 15OCT92

-AMENDMENT-

UPDATED STABILITY LETTER DATE.

*** END ***

DEPT. OF TRANSP., USCG, CG-841 (Rev. 3-85)
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PLC-R00588

SN 7530-00-FO1-0370

RECEIVED
AUG 1
LUMA CONSTRUCTORS
CONTRACT NO. 3378

CERTIFICATION DATE: 07NOV91
EXPIRATION DATE: 07NOV93

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL NAME	OFFICIAL NUMBER	CALL SIGN	SERVICE
HAAKON	D246141	WBX6777	UNCLASSIFIED VESS.

HOME PORT	HULL MATERIAL	HORSEPOWER	PROPULSION
SEATTLE, WA	STEEL		NONE

PLACE BUILT	DATE BUILT	GROSS TONS	NET TONS	DWT	LENGTH
SAUSALITO CA	01JAN43	2490	2490		279.80

OWNER
MANSON CONSTRUCTION & ENGINEERING
P O BOX 24067
SEATTLE, WA 98124

OPERATOR
MANSON CONSTRUCTION & ENGINEERING
P O BOX 24067
SEATTLE, WA 98124

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL, INCLUDED IN WHICH THERE MUST BE 0 CERTIFICATED LIFEBOATMEN AND 0 CERTIFICATED TANKERMAN.

___ MASTER	___ MASTER & 1ST CLASS PILOT	___ ABLE SEAMEN	___ CHIEF ENGINEER	___ FIREMEN/WATERTENDERS
___ CHIEFMATE	___ ___ CLASS PILOT	___ ORDINARY SEAMEN	___ 1ST ASST. ENGINEER	___ OILER
___ 2ND MATE	___ RADIO OFFICER(S)	___ DECKHANDS	___ 2ND ASST. ENGINEER	___ ___
___ ___ MATES	___ ___ OPERATOR(S)	___ ___	___ ___ ENGRS.	___ ___

IN ADDITION, THIS VESSEL MAY CARRY 0 PASSENGERS, ___ OTHER PERSONS IN CREW, ___ PERSONS IN ADDITION TO CREW, AND 6 INDUSTRIAL PERSONNEL, TOTAL PERSONS ALLOWED: 6

ROUTE PERMITTED AND CONDITIONS OF OPERATION:

OCEANS

THIS VESSEL MAY OPERATE AS A DECK CARGO BARGE OR AS A DERRICK BARGE IN ACCORDANCE WITH ITS STABILITY LETTER ISSUED 04 MAY 1992.

ALTHOUGH CERTIFICATED WITHOUT A NAVIGATING CREW, UP TO 6 INDUSTRIAL PERSONNEL ARE ALLOWED WHEN MOORED ON STATION.

AN ASSIST VESSEL IS REQUIRED TO BE ALONGSIDE THE BARGE AT ALL TIMES WHEN THE VESSEL IS MANNED.

THE DECK CRANE BOOM SHALL BE IN THE STOWED POSITION WHILE THE VESSEL IS UNDERWAY.

INSPECTIONS SAN Diego 619 5575/88

*** SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION ***

WITH THE INSPECTION HAVING BEEN COMPLETED AT SEATTLE, WASHINGTON ON 07NOV91 THIS VESSEL IS CERTIFIED BY THE OFFICER IN CHARGE, MARINE INSPECTION: PUGET SOUND TO BE IN ALL RESPECTS IN CONFORMITY WITH THE APPLICABLE VESSEL INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

PERIODIC REINSPECTIONS		
DATE	ZONE	SIGNATURE

THIS CERTIFICATE ISSUED BY:

ROGER D. MOWERY, CAPT, USCG
OFFICER IN CHARGE, MARINE INSPECTION
PUGET SOUND
INSPECTION ZONE

DEPT. OF TRANSP., USCG, CG-841 (REV. 8-85)
PREVIOUS EDITIONS ARE OBSOLETE
GPO 1986-491-028/42178

12a

File: 27-22

EXHIBIT 10

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Certificate of Inspection

AKDN PAGE 2 CERTIFICATION DATE: 07NOV91

--- HULL EXAMS ---

-EXAM TYPE-	-NEXT EXAM-	-LAST EXAM-	-PRIOR EXAM-
DRYDOCK	25SEP94	07NOV91	25SEP89
INTERNAL STRUCTURAL	25SEP94	07NOV91	25SEP89

--- STABILITY ---

LETTER - APPROVAL DATE/ 04MAY92 - -OFFICE/ BEAMB

--- INSPECTION STATUS ---

FUEL TANKS

-TANK IDENTIFICATION-	-DATE EXAMINED-
2C	07NOV91

PRESSURE VESSELS

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	DECK	07NOV91	07NOV93
AIR RECEIVER	CRANE	07NOV91	07NOV93
AIR RECEIVER	CRANE	07NOV91	07NOV93

--- LIFESAVING EQUIPMENT ---

	NUMBER PERSONS		REQUIRED
TOTAL EQUIPMENT FOR	6	LIFE PRESERVERS(ADULT)...	6
LIFEBOATS(TOTAL).....		LIFE PRESERVERS(CHILD)...	
LIFEBOATS(PORT)*.....		RING BUOYS(TOTAL).....	2
LIFEBOATS(STARBD)*...		WITH LIGHTS*.....	
MOTOR LIFEBOATS*.....		WITH LINE ATTACHED*....	2
LIFEBOATS W/RADIO*...		OTHER*.....	
RESCUE BOATS/PLATFORMS.	1	IMMERSION SUITS.....	
INFLATABLE RAFTS.....		PORTABLE LIFEBOAT RADIOS.	
LIFE FLOATS/BUOYANT APP		EQUIPPED WITH EPIRBS?.....	NO
WORKBOATS (NOT REQUIRED)		(* INCLUDED IN TOTALS)	

--- FIRE FIGHTING EQUIPMENT ---

TOTAL HOSE LENGTH/ NUMBER OF FIRE AXES/ 2 NUMBER OF FIRE PUMPS/

FIRE EXTINGUISHERS - HAND PORTABLE AND SEMI-PORTABLE

A-II	B-I	4 B-II	B-III
B-IV	B-V	C-I	2 C-II

--- CERTIFICATE AMENDMENTS ---

1. PORT AMENDING/ SEAMS DATE AMENDED/ 04MAY92

-AMENDMENT-

CHANGED OPERATING DETAILS TO ALLOW VSL TO OPERATE AS A DECK CARGO BARGE OR DERRICK BARGE IN OCEAN SERVICE. REISSUED STABILITY LTR.

*** END ***

George J. Koelzer (State Bar No. 164156)
Matthew P. Kesner (State Bar No. 120596)
Carolyn J. Shields (State Bar No, 169911)
LANE POWELL SPEARS LUBERSKY
333 South Hope Street, Suite 2400
Los Angeles, California 90071-3033
Telephone: (213) 680-1010
Facsimile: (213) 680-1784

Attorneys for Defendants
MARTECH USA, INC., POINT LOMA CONSTRUCTORS,
MANSON CONSTRUCTION & ENGINEERING CO.
and MORRISON KNUDSEN CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

No. 950673
STIPULATION

GILBERT [SIC] HOEFLICH

Plaintiff,

v.

MARTECH INTERNATIONAL, INC.,
MARTECH USA INC, POINT LOMA CONSTRUCTORS,
A Joint Venture, between Morrison Knudsen Corp.
and Manson Construction & Engineering Co.,
MORRISON KNUDSEN CORP., MANSON CONSTRUCTION
& ENGINEERING CO., RED & WHITE DIVING, INC.,
AND DOES 1 through 25

Defendants.

EXHIBIT G

IT IS STIPULATED by and between GIL HOEFLICH, plaintiff (hereinafter "plaintiff"), and MARTECH USA, INC., POINT LOMA CONSTRUCTORS, a Joint Venture between Morrison Knudsen Corp. and Manson Construction & Engineering Co., MORRISON KNUDSEN CORP., and MANSON CONSTRUCTION & ENGINEERING CO., defendants, through their respective counsel, that the amounts set forth herein have been paid by defendants to or on behalf of plaintiff in respect of the alleged losses which are the subject of this action.

Date	Payor	Payee	Check No.	Other Amount	Medical Amount
09-13-92	Martech	Gil Hoeflich		$ 2700	
10-02-92	Martech; see Ltr TR to GH, 11-06-92	Gil Hoeflich		$ 2000	
11-04-92	Martech; see Ltr TR to GH, 11-06-92	Gil Hoeflich		2000	
11-06-92	Kelly Cox	Gil Hoeflich	104	3000	
11-10-92	Kelly Cox	UCSD Medical Group			7884.53
11-17-92	Kelly Cox	Gil Hoeflich	See Ltr KC to GH 11-17-92	2000	

Date	Payor	Payee	Check No.	Other Amount	Medical Amount
11-30-92	Kelly Cox	Gil Hoeflich	108	2000	
12-08-92	Kelly Cox	Gil Hoeflich	111	2000	
12-21-92	Kelly Cox	UCSD Medical Group	112		628
12-21-92	Kelly Cox	Sansum Medical Clinic			98
12-29-92	Kelly Cox	Gil Hoeflich	114	2000	
01-25-93	Kelly Cox	Gil Hoeflich	116	4000	
02-10-93	Kelly Cox	Gil Hoeflich	119	2000	
02-24-93	Kelly Cox	Gil Hoeflich	120	2000	
03-08-93	Kelly Cox	Gil Hoeflich	122	2000	
03-22-93	Kelly Cox	Gil Hoeflich		2000	
03-23-93	Kelly Cox	Sansum Medical Clinic			244
04-30-93	LPSL Trust Account (T/A)	Nobbe Ortho-pedics, Inc.	2920		450

Date	Payor	Payee	Check No.	Other Amount	Medical Amount
05-26-93	LPSL T/A	UCSD Medical Group	2159		23411.53
05-26-93	LPSL T/A	UCSD Medical Group	2161		880.61
06-02-93	LPSL T/A	UCSD Medical Group	2165		25644.51
06-16-93	LPSL T/A	Gil Hoeflich	2166		240.22
06-16-93	LPSL T/A	Nobbe Ortho-pedics, Inc.	2167		615.00
07-08-93	LPSL T/A	Santa Barbara Cottage Hospital	2169		7455.69 (not yet presented)
07-28-93	LPSL T/A	UCSD Medical Center	2173		159871.75
09-10-93	LPSL T/A	Nobbe Ortho-pedics, Inc.	2175		100.00
12-16-93	LPSL T/A	Gil Hoeflich	2178	10,000.00	
12-93	CIGNA	Gil Hoeflich		10,000.00	

Date	Payor	Payee	Check No.	Other Amount	Medical Amount
09-01-94	LPSL T/A	Nobbe Othho-pedics	58905		500.00
09-01-94	LPSL T/A	J.P. Blan-chard, M.D.	58906		322.00
09-01-94	LPSL T/A	Santa Barbara Founda-tion Clinic	58907		2314.10
09-01-94	LPSL T/A	Santa Barbara Cottage Hospital Patient Accounts	58908		4093.69
09-01-94	LPSL T/A	Gil Hoeflich	58909		2292.83
09-15-94	LPSL T/A	Sansum Medical Clinic	1179		94.62
09-15-94	LPSL T/A	Victor Taccon-elli, M.D.	1180		705.00
09-15-94	LPSL T/A	Doctor's Clinic (Larry Hazen)	1181		164.70

Date	Payor	Payee	Check No.	Other Amount	Medical Amount
09-15-94	LPSL T/A	Chil-dren's Hospital	1182		2056.00
09-19-94	LPSL T/A	Gil Hoeflich Sansum 342. Tacc. 580. Drs' 77.50			999.50
TOTALS				49.700	241.066.28

The parties stipulate as follows:

The figures set forth above are true and correct.

The total amount of medical payments made by defendants to or or [sic] behalf of plaintiff is $241,066.28 (Two Hundred Forty-One Thousand Sixty-Six and 28/100ths Dollars).

The total amount of nonmedical payments made by defendants to or on behalf of plaintiff is $49,700 (Forty-Nine Thousand Seven Hundred and 00/100ths Dollars).

The total amount of payments made by defendants to or on behalf of plaintiff is $290,766.28 (Two Hundred Ninety Thousand Seven Hundred Sixty-Six and 28/100ths Dollars).

Each of the payments set forth herein shall be inadmissable on the issue of the liability of any of the defendants in this action for the loss or damage claimed by plaintiff, and each of said payments shall be subject to a limiting instruction that it may not be considered by the jury

to prove the liability of any defendant for the loss or damage, or any part of the loss or damage, claimed by plaintiff, pursuant to section 1152(a) of the Evidence Code.